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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 891.

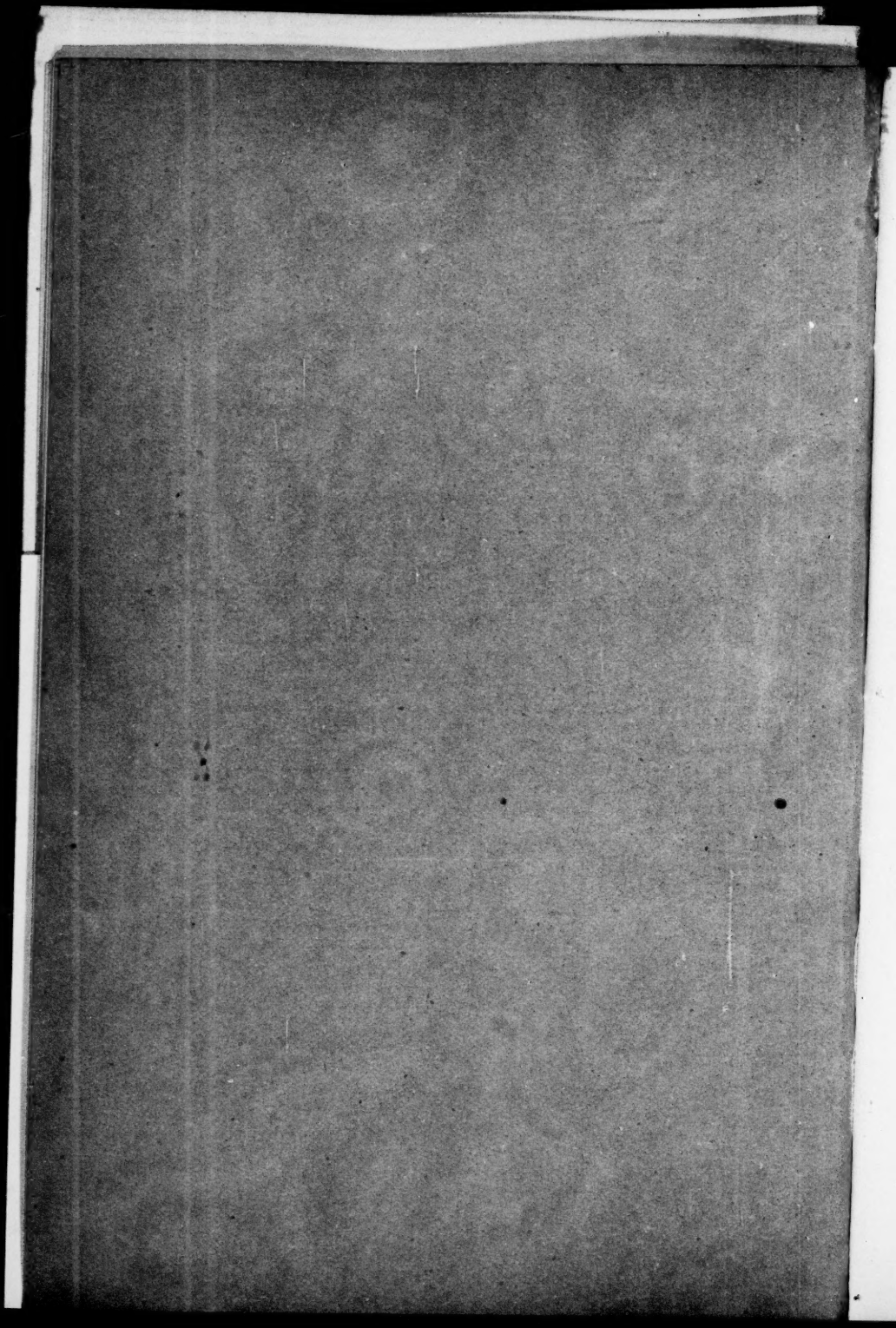
FREDERICK T. FRELINGHUYSEN, SECRETARY OF STATE,
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX RELATIONE JOHN J. KEY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 6TH, 1883.



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1 In the supreme court of the District of Columbia.

THE UNITED STATES EX RELATIONE JOHN J. KEY
vs.
FREDERICK T. FRELINGHUYSEN, SECRETARY OF States.

To the supreme court of the District of Columbia:

The petition of John J. Key respectfully shows:

1st. That your petioner is a citizen of the city Washington, District of Columbia.

2nd. That on the 4th day of July, 1868, a convention between the United States of America and the Republic of Mexico for the adjustment of claims of citizens of each country against the other was concluded, which provides, in substance and effect, that the claims under the said convention should be decided by two commissioners conjointly, or, in case of their disagreement, by an umpire, who were to be appointed and chosen and were to qualify in the manner therein specified, as by refer-
2 ence to the said convention will fully appear and to which your petitioner begs leave to refer; that thereafter said convention was duly ratified by each party thereto, and the commissioners and umpire therein provided for were duly appointed and chosen, and thereupon they severally duly qualified as such and entered upon their duties under said convention.

3rd. Your petitioner says that the claim of one Benjamin Weil, a citizen of the United States of America, against the Government of the Mexican Republic, arising from injuries to his property by the authorities of that Republic, was presented to the joint commission so established under said commissi' as aforesaid within the time and in the manner and form thereby required, and for about six years, from 1869 to 1875, the said Benjamin Weil, at much expence and trouble, prosecuted his said claim before the said commission, and the same was fully presented by
3 said Weil, by evidence, and was ably defended by the Mexican Government; and the said commissioners having heard each Government through their respective counsel, and each Government fully recognizing the jurisdiction of the said joint commission over the said claim, and thereupon such proceedings were thereafter had in the matter of said claim that the said commissioners having disagreed, Sir Edward Thornton, the said umpire, who had been duly chosen and had qualified as aforesaid, on the 1st day of October, 1875, made a decision on said claim, and an award therein in favor of the said Benjamin Weil and against the Republic of Mexico for sums and interest thereon, which together, as officially estimated and admitted by the Department of State of the United States, amount to the sum of four hundred and eighty-seven thousand eight hundred and ten sixty-eight hundredths dollars (487,810.68)
4 but for greater certainty as to exact amount your petitioner refers to the award of said Edward Thornton and the estimates of the Department of State as the amount due the said Benjamin Weil, as estimated as aforesaid The original decision of said Edward Thornton and

the records of the case of Benjamin Weil are all in the Department, and the fact of the rendition of said award is not dispnted.

And your petitioner further shows:

4th. That *by* the second article of the convention binds the two Governments "solemnly and sincerely, to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, and to give full effect to such decisions without any objection, evasion, or delay whatsoever," and that in and by the 5th article of said convention said Governments agree to consider the result of the proceedings of "said" com-
5 mission as full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of said convention, and that every such claim shall, from and after the conclusion of said proceedings, be considered and treated as finally settled, as by reference to said articles will fully appear.

5th. That after the rendition of said award in favor of the said Benjamin Weil, and on the 29th day of April, 1876, a convention was concluded between said two Governments, and the same was subsequently duly ratified, "for extending the functions of the umpire under the convention of July 4, 1868;" and that said convention of April 29, 1876, in and by its 2nd article, fully recognized and provided for the payment of the "total amount awarded in all cases already decided, whether by the commissioners or by the umpire," as well as in cases subsequently to be decided,
6 as by reference to said last-mentioned convention will fully appear, and to which your petitioner begs leave to refer.

6th That on the 14th day of December, 1876, the expenses of said commission were adjusted pursuant to the 6th article of said convention of July 4th, 1868, and the account thereof stated, and a balance therein as between the two Governments struck, and the same and a protocol of the same date for the purpose of said adjustment were signed by the Secretary of the United States and the minister plenipotentiary of the Mexican Republic; that in said account the United States is charged with the percentage of said expenses upon the total amount of the awards made under said convention against the Republic of Mexico, in which total amount is included the amount of said award of Benjamin Weil; that the amount of said percentage on said award is thousand dollars or thereabouts, and
7 that in said protocol it is stated that said Secretary of State and minister plenipotentiary "have caused the said account to be stated, and have approved the same under their respective hands," as will fully appear by said account and protocol, on file in the Department of State, and to which your petitioner begs to refer for greater certainty.

And your petitioner further shows and believes:

7th. That your petitioner is advised and believes, and so avers, that by virtue of the facts and matters aforesaid the said award in favor of the said Benjamin Weil was made final and conclusive, and was and is the judgment of a tribunal of competent jurisdiction, and was and is property, and the right to which as property was thereby vested in the said Benjamin Weil.

And your petitioner further shows:

8th. That the total amount of the awards rendered under said

8 conventions in favor of citizens of the United States was greater than the total amount of those rendered thereunder in favor of citizens of Mexico, and that pursuant to the provisions of said conventions the Government of Mexico has made sundry annual payments of $300,000 each upon the balance of said awards against the Republic of Mexico remaining after deducting one of said total amounts from the other, and the moneys so paid have been received by the Secretary of State of the United States.

And your petitioner further shows:

9th. That on the 18th day of June, 1878, the act of Congress of the United States entitled "An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868," was approved, and by the 1st section of said act the Secretary of
9 State is required "to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the convention of July 4th, 1868, and April 29th, 1876, aforesaid," "and whenever and as often as any installment shall have been paid by the Mexican Republic on account of said awards to distribute the moneys so received in ratable proportions among the corporations, companies, and private individuals respectively in whose favor awards have been made," or to their legal representatives or assigns, *by* reference to said act will fully show.

10th. That your petitioner is advised and believes, and so avers, that by said act of Congress the money paid by the Republic of Mexico is placed in the hands of the Secretary of State as a trustee, to be paid to the respective claimants in the proportion required by said law; that the receipt and payment of said money by said Secretary are ministerial acts
10 merely, and that is the duty of said Secretary as a mere ministerial act to pay the respective claimants their respective proportions thereof.

And your petitioner further shows:

11th. That the 5th section of said act of Congress provides in words and substance that the President of the United States be required to investigate any charges of fraud presented by the Mexican Government in the case of the said Benjamin W "and if he shall be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the award" in the case of the said Benjamin Weil should be opened and the case retried, it shall be lawfull for him to withhold payment of said award until the case shall be retried and decided in such manner as the Government of the United States and Mexico may agree, or until Congress otherwise direct, as by reference thereto will fully appear.

12th. That your petitioner does not admit, but wholly denies, the
11 right and power of Congress to pass the provisions of said act for the retrial of the case in any contingency whatever. Nevertheless, the President, through the Hon. Wm. M. Evarts, then the Secretary of State, did make the ivestigation supposed to be authorized by the said law, of the charges of fraud presented by the Mexican Government, and after hearing full argument on both sides, by the attorneys of Mexico and the said Benjamin Weil, did, in 1879, decide that neither the principles of public law nor considerations of justice or equity require or permit, as

between the United States and Mexico, that the award of the said Benjamin Weil should be opened and the case retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico.

13th. That said decision was communicated to Congress by the President in a special message on the 15th of April, 1880, and is to be found in Senate Executive Document No. 150, 2nd session of the 46'
12 Congress, and to which reference is hereby made for greater certainty.

14th. Your petitioner submits that this decision of the President against a retrial of the case before any new international tribunal was a full performance of the duty attempted to be imposed upon him by the law aforesaid, and fully exhausted his supposed authority derived therefrom; but the President suggested a further inquiry before some domestic tribunal to be established by Congress, to ascertain whether or not there may have been a fraudulent claim made by the said Benjamin Weil; and finally the President, in suggesting in his said report of April 15, 1880, that Congress might provide an adequate procedure for conducting the proposed additional investigation, concluded his decision with these words: "Unless Congress should now make this disposition of the matter, and furnish thereby definate instructions, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and pro-
13 ceed in the payment of the same pro rata with all other awards under the convention." Prior to said report, and on or about the 31st of January, 1880, another instalment of $300,000 (being the 4th instalment) was paid by Mexico under said conventions; and Congress having adjourned on the 4th of March following, without having taken any steps or action in the matter, the President held the said award as no longer open to consideration; and the Secretary of State accordingly thereafter, in 1880, paid on the award in favor of Benjamin Weil his pro rata proportion of the four instalments received by the United States from Mexico. Subsequently, in 1881, a like sum, 5th instalment, which was paid by Mexico under said conventions on or about January 31st, 1881, was paid to Benj. Weil and his assignees.

Your petitioner now shows and avers that the President of the United States expressly declared and decided that the award in favor of the said Benjamin Weil was no longer open to consideration, and by writ-
14 ten communication to the Secretary of State, communicated to him after the adjournment of Congress, on the 4th day of March, 1880, directed the payment of the four instalments then due the said legal representatives and assignees of said Weil, who had deceased since the award had been rendered in his favor, and your petitioner refers to said letter, which is in the possession of the Department of State. Your petitioner further shows and avers that the 5th instalment paid by the Government of Mexico was paid to the legal representatives and assignees of Benjamin Weil by the Hon. James G. Blaine, then Secretary of State, in the year 1881; and your petitioner shows and avers that he received the amount due him as an assignee of a part of said award, and that his individual receipt for all five instalments was required and given, and that the same is now in charge of the Department of State, and he refers to the same.

15th. Your petitioner, not admitting but expressly denying, all power in the Executive or in Congress, by means of either such new trial as the United States or Mexico might agree upon, as provided in said law, or by any other means, without the consent of your petitioner, which was never given, to set aside or impair the finality of said award, or your petitioner's vested rights and interest therein, yet avers and charges that by the said decisions of the President against any further trial or investigations, either before an international tribunal or a domestic one, all semblance or pretence of power to so retry, as conferred by the act of June 18, 1878, became and was completely destroyed and exhausted, and the duty of the Secretary of State to pay over said money and all future instalments became and was at the time the demand hereinafter mentioned was made and now is imperative under said act of Congress.

And your petitioner further shows:

16th. That on or about the 31st day of January, 1882, another (the 6th) instalment of $300,000 was paid by Mexico, under said conventions, to the Secretary of State (the Hon. Frederick T. Frelinghuysen, then and now acting and being such Secretary of State) who received the same under said act of Congress, and that the proper proportion thereof payable upon the said award of Benjamin Weil to his representatives and assignees is the sum of $34,893.68, and the amount due your petitioner as assignee is $7,595.39, which sum it was and is the plain duty of said Secretary of State, as a mere ministerial act, to pay to your petitioner, whose assignments are on file in said Department of State, and that on the day of November, 1882, your petitioner caused a demand on said Secretary of State, at his office in Washington, D. C., to be made on behalf of your petitioner, whose assignments are on file in said Department of State, for the said sum of $7,595.39, and that your petitioner then and there demanded said sum and personally and in writing made the demand on the said Secretary of State, the Hon. Fredrick T. Frelinghuysen, of the amount due him, and your petitioner avers the said Secretary of State declined to pay him the amount due, and he now files and refers to an exact duplicate of his written demand, and refers to the same, marked "A," and avers the original is now in the possession of the Department of State and the same has not been paid to your petitioner, nor any part thereof, and to pay the same or any part thereof to your petitioner the said Secretary of State wholly neglected and refused.

Your petitioner further shows:

Your petitioner shows and avers that in the year 1869 he was employed as a counsellor and attorney at law by the said Benjamin Weil to prosecute a claim in his behalf against the Government of the Republic of Mexico before the said joint commission heretofore referred to, and received from said Weil a power of attorney, duly executed, authorizing your petitioner to bring and prosecute the same, with full power to collect all amounts that might be recovered, and at the same time received from said Weil an agreement to pay your petitioner and H. J. Hays one-half of all amounts that might be recovered before said commission, which was duly executed and delivered to your petitioner. Your petitioner shows and avers that in conformity to that agreement, on the

18 5th day of November, 1875 (the said Weil at that time having been declared insane by a court of competent jurisdiction in the State of Louisiana), Lambert B. Cain, as attorney in fact for Alice Weil, wife of said Benj. Weil, in her own right and as amatrix of the estate of her insane husband, Benjamin Weil, and jutrix of their infant son John Weil, executed to your petitioner and others an assignment and transfer of parts of said award of Benjamin Weil against Mexico, in which after deducting a certain amount from principal and interest, or the actual amount then due on said award after the amount taken therefrom by the two Governments for expenses of the said commission had been taken off, there was assigned to your petitioner one-fourth of said award, which was due your petitioner under the agreement executed by Weil to your petitioner and H. I. Hays heretofore referred to. Your petitioner further shows and avers that after the said assignment, dated 5th November, 1875, the said Benjamin Weil died, and Alice Weil, his wife, was appointed

19 successor to his estate and jutrix of their infant son, John Weil, by a court of competent jurisdiction in the State of Louisiana, and that she appointed Lambert B. Cain as her attorney in fact in her own right and as successor of her said husband and jutrix of their infant son, who executed a second assignment to your petitioner, and another during the year 1880, reaffirming the assignment made to your petitioner on the 5th November, 1875, and making transfer of one-fourth of said award as had been done in the previous assignment and transfer.

Your petitioner further shows that the two assignments made to him and others were made after the rendition of said award of Weil, and when the same was fully vested in said Weil, and when the same could be legally transferred and vested in another, and your petitioner avers that the assignments made to him as herein set forth was to execute and complete the agreement made by said Weil with him and H. I. Hays.

Your petitioner shows and avers that he faithfully discharged

20 his duties as attorney and counsellor at law, and was engaged in the prosecution of said claim as such from 1869 to 1876, and that he was at great expense, and did, on various occasions, expend large sums of money in connection with said claim, and that said Benjamin Weil in his life-time did receive your petitioner's services, and that your petitioner did execute fully and perform all that he promised and undertook to do when he accepted the agreement executed by said Weil to him and H. I. Hays; that he is entitled, as assignee, as set forth herein, to the amount of $7,595.39, as herein set forth, and which has been unjustly and illegally withheld by said Hon. Frederick T. Frelinghuysen. Your petitioner to the power of attorney of Weil to him; the agreement of Weil with him and H. I. Hays; the assignments of Cain, as attorney, to him & others; the power of attorney, and judicial records accompanying, of the representatives of Weil to L. B. Cain; and your petitioner avers all of said papers

having been filed, and are in the Department of State, and beyond

21 his control, but he avers the truth of the statements herein of their contents and purposes.

Your petitioner further shows and avers that the validity and legal effects of the assignments made to him as herein stated have been twice recognized by the Department of State and his receipts taken for his proportion of the five instalments paid on the said award of Benjamin Weil,

and he refers to said receipts, and charges that they are filed in the Department of State and beyond his control.

Your petitioner further shows:

18th. Your petitioner shows and avers that no charge has ever been made, as far as he knows and believes, as to the character of the commissioners or of the umpire who composed the commission under the said treaty of July 4th, 1868, for integrity, or that the said award rendered by the umpire was obtained from him by corrupt combination with him on the part of Benjamin Weil or any person representing him or any one whatever, and that the validity of said award cannot be attacked
22 for any such cause, and that the claimant Weil and the Republic of Mexico were fully heard before the tribunal created to decide finally upon the claim of said Weil.

19th. Your petitioner is without redress by the ordinary legal methods, and has no other remedy except the interposition of this honorable court by the writ of mandamus.

20th. Wherefore your petitioner prays that this honorable court may issue the writ of mandamus, commanding the said Frederick T. Frelinghuysen, as said Secretary of State, to pay to your petitioner the money so demanded by him *as* your petitioner as aforesaid and as by law he is bound to do, and your , as in duty bound, will ever pray, &c.

JOHN J. KEY, *In Person.*
R. B. WARDEN.
S. W. JOHNSTON.
JOHN GOODE, *Att'y.*

23 DISTRICT OF COLUMBIA,
County of Washington, ss:

John J. Key, being duly sworn, says, that he is the person named in the foregoing petition and whose name is subscribed thereto, and knows the contents of said petition, and that all and singular the matter and facts stated and contained in said petition are true to the best of his knowledge, information, and belief.

R. J. MEIGS, *Clerk &c.*
R. J. MEIGS, JR. *Ass't.*

24 WASHINGTON, D. C., *Nov.* , 1882.

Hon. FREDERICK T. FRELINGHUYSEN,
Secretary of State:

SIR: On the 1st day of October, 1875, Sir Edward Thornton made a decision as umpire of a commission formed under a treaty between the United States and the Government of Mexico, dated July 4th, 1868, in case No. 447, of Benjamin Weil against Mexico for the sum of two hundred and eighty thousand dollars and interest on the same, which to the time of the termination of the convention amounted to the sum of one hundred and ninety-three thousand one hundred and seventy dollars, and one hundred dollars costs, in favor of the claimant, Benjamin Weil, to be paid by the Government of Mexico in Mexican gold dollars under the terms of said treaty.

The sixth instalment due on said award was paid by the Mexican Government and was received by you about the 31st of January, 1882, under

the authority and in compliance of an act of Congress dated the
25 18th of June, 1878, entitled an "Act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868, and the amount now due and received by you under the award of Benjamin Weil is thereby four thousand eight hundred and ninety-three $\frac{68}{100}$ dollars.

The undersigned, an assignee of the proper representatives of Benjamin Weil, who has deceased since the rendition of said award says, by his assignments regularly filed in the Department of State, and the regularity and validity of which has been fully recognized by said Department by the payment to him of his proportion of five instalments of said award there is now due to the undersigned his proportion of the sixth instalment which was received by you from the Mexican Government the sum of seven thousand five hundred and ninety-five $\frac{39}{100}$ dollars.

You are respectfully requested and demand is now made on you to pay said amount of $7,595.39 to the undersigned, the same being due
26 him in Mexican gold dollars, or its equivalent.

Your ob't s't,

JOHN J. KEY.

27 In the supreme court of the District of Columbia, the 7th day of December, 1882.

THE UNITED STATES EX RELATIONE JOHN J. Key
vs.
FREDERICK T. FRELINGHUYSEN, SECRETARY of State. } At law. No. 24076.

On reading the petition for the writ of mandamus filed in the above-entitled cause, and upon considering the same, it is this 7th day of December, A. D. 1882, ordered that the defendant show cause on the 11th day of Dec., 1882, at 10 o'clock a. m., before the court in general term, why the said writ of mandamus should not issue as prayed, and that a copy of the order be served on the defendant on or before the 8th day of Dec., 1882.

MAC ARTHUR, *Justice.*

28 Served copy of this rule on Frederick T. Frelinghuysen, Secretary of State of the United States, Dec. 8, 1882.

CLAYTON McMICHAEL,
Marshal.

29 In suprem' court of the District of Columbia, December, 1882.

JOHN J. KEY
vs.
F. T. FRELINGHUYSEN, SECRETARY OF STATE.

And now comes the said F. T. Frelinghuysen and writes that the peti-

tion of said John J. Key is not sufficient in law to entitle him to the relief for which he prays.

PHILIPPS,
Solicitor-General.

30 Supreme court of the District of Columbia, sitting in general term, January 29, 1883.

THE UNITED STATES EX REL. JOHN J. KEY, plaintiff, *vs.* FREDERICK T. FRELINGHUYSEN, DEFENDANT. } At law. No. 24076.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the rule to show cause heretofore laid by the court upon the defendant shall stand in lieu of and be treated as an alternative writ of mandamus.

JOHN J. KEY,
For Relator.
S. F. PHILIPPS,
For Defendant.

31 Supreme court of the District of Columbia, sitting in general term, Feb. 12, 1883.

THE UNITED STATES EX REL. JOHN J. KEY, plaintiff, *vs.* FREDERRICK T. FRELINGHUYSEN, DEFENDANT. } At law. No. 24076.

The court orders that notwithstanding the stipulation between the attorneys of the respective parties that the rule to show cause heretofore laid by the court upon the defendant, should stand in lieu of, and be treated as an alternative mandamus, an alternative mandamus in due form shall be issued by the clerk.

32 In the supreme court of the District of Columbia, Feb'uary 15, 1883.

THE UNITED STATES EX REL. JOHN J. KEY *vs.* F. T. FRELINGHUYSEN, SECRETARY OF STATE. } At law. No. 24076.

The President of the United States to the defendant, greeting:

Whereas it appears to the said court that of the money awarded to Benjamin Weil under the convention of July 4, 1868, between the United States and the Republic of Mexico, the relator claims the sum of seven thousand five hundred and ninety-five dollars and thirty-nine cents as assignee of the said Benjamin Weil, which, as he says, you refuse to pay. Now, therefore, you are hereby commanded either to pay said money to the relator, or, if you decline to do so, show cause to the contrary before this court on the 26th day of Feb'uary, 1883.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

33 Served copy of alternative mandamus on the within defendant Feb. 17, 1883.

CLAYTON McMICHAEL,
U. S. Marshal.

34 Supreme court of the District of Columbia, sitting in general term, Feb. 26th, 1883.

THE UNITED STATES EX REL. JOHN J. KEY, plaintiff, *vs.* FREDERICK T. FRELINGHUYSEN, DEFENDANT. } At law. No. 24076.

On motion, the time for answering by the defendant is extended to Friday, March 2nd, 1883.

35 In the supreme court of the district of Columbia.

THE UNITED STATES EX REL. JOHN J. KEY *vs.* FREDERICK T. FRELINGHUYSEN. } At law. No. 24076.

Your respondent, Frederick T. Frelinghuysen, Secretary of State of the United States, respectfully shows unto your honor that on the 16th ulto. he was served with an order which, after stating the title of the suit as above given, is in the words following:

The President of the United States to the Department, greeting:

Whereas it appears to the said court that of the money awarded to Benjamin under the convention of July 4th, 1868, between the United States and the Republic of Mexico, the relator claims the sum of seven thousand five hundred and ninety-five dollars and thirty-nine cents,
36 as assignee of the said Benjamin Weil, which, as he says, you refuse to pay:

Now, therefore, you are hereby commanded either to pay said money to the relator, or, if you decline to do so, show cause to the contrary before this court on the 26th day of February, 1883.

Witness, D. K. Cartter, chief justice,

[L. S.] R. J. MEIGS, *Clerk.*

True copy,

R. J. MEIGS, *Clerk, &c.,*
By R. J. MEIGS, JR.
Ass't Clerk.

And your respondent shows the following cause for not paying the said money to the said Key:

That your respondent, having been duly appointed Secretary of State of the United States on the 19th December, 1881, was qualified for and assumed the duties of the office on that day, and as Secretary of State has discharged the same from that date until the present time.

That holding such office he is the head of one of the Executive
37 Departments of the Government and is regarded by the statutes of

the United States to "perform such duties as shall from time to time be enjoined on or entrusted to him by the President * * * relative * * * to such matters respecting foreign affairs as the President of the United States shall assign to the Department, and shall conduct the business of the Department in such manner as the President shall direct."

And your respondent respectfully states that he has withheld and still withholds the money mentioned in the said order by the order and direction of the President of the United States, who represents and is the head of the executive department, being one of the three co-ordinate branches of the Government under the Constitution of the United States.

That the President of the United States by the Constitution thereof is empowered to make treaties, and to that end to make all measures
38 requisite to the negotiation of such treaties, which treaties, when submitted by him to the Senate, and by it ratified become binding compacts on this Government, as the supreme law of the land.

And your respondent shows that under the convention of July 4th, 1868, between the United States and the Republic of Mexico, referred to in the said order, it was on the 7th October, 1875, awarded by the umpire appointed under the said convention that the Republic of Mexico pay to the United States on account of the claim of the said Benjamin Weil the sum of $285,000, with 6 per cent. interest from Sept. 20, 1864; that the Republic of Mexico has paid certain instalments on said award, which have been distributed, and certain other instalments are yet unpaid by the Republic of Mexico.

And the President of the United States, believing that the said award was obtained by fraud and perjury, deemed and still deems it his duty to withhold for the time being the distribution of the instalments
39 now on hand, an essential measure to the negotiation of a treaty with the Republic of Mexico, providing for a rehearing of the demand made by the United States on Mexico in respect to the claim of said Benjamin Weil; and that such a treaty has been negotiated by the President of the United States with the Republic of Mexico, and has been submitted to the Senate of the United States that it may determine upon the ratification of said treaty, and the said treaty is now under consideration by the Senate.

And this respondent further respectfully submits to your honors that the President, in so doing, has acted by and within his plain constitutional powers; and that this respondent has only discharged his duty in obeying the President's orders in this behalf, and has neither exerted or refrained from exerting any personal or official duty in the premises other than to obey the directions of the President of the United States.

And your respondent further shows that while the first section
40 of the act of June, 1878, chapter 262, requires the Secretary of State to distribute the moneys by him received from the Mexican Republic under said convention of July 4th, 1868, to the corporations, companies, and private individuals respectively, in whose favors awards have been made by the said commissioners or by the umpire, or to their legal representatives or assignees, that yet the said section in no manner limits the power of the President to negotiate a treaty with Mexico for a rehearing, as it is hereinbefore stated he has done, which treaty when ratified will become by the Constitution the law of the land.

And your respondent respectfully submits to your honors that all awards

made under treaties in favor of the United States on account of the claims of its citizens and of the nature of those referred to in the first section of said act create no private right that is not subject to the political action of the Government. That Congress in passing the first section of said act understood that its provisions were subject to the free exercise
41 by the President of his duties and powers relative to all matters of interest between this Republic and other Governments. And if in the exercise of those powers private rights are impaired the assumption of law is that the Government of the United States will voluntarily make all proper reparation, and not by the coercion of the judiciary department; and your respondent submits that it is because of the infraction of the plain principle above stated that we have in this case the anomally of a suit by the United States virtually against the President, and an order in the name of the President ordering the Secretary of State to pay money withheld by his direction.

And your respondent, while respectfully insisting that the claimants referred to in the said act have no right that the judiciary can enforce so as to contravene the political and constitutional action of the executive departments, further submits that in any event the claimants acquired
42 a right no more vested than that of one in whose favor a judgment of a competent court has been rendered, and that the right of the claimant in the one case as well as in the other be questioned by competent authority, and if found to have been obtained by fraudulent practice upon the court or upon the commission, can be declared void, and submits that the measure inaugurated by the President, and now pending before the Senate, is the proper mode of adjudicating the question whether the claim of the said Benjamin Weil was allowed through fraudulent practice.

And the respondent further shows that the provisions of the first section of the act of June 18, 1878, are expressly limited and controlled by the provisions of the 5th section of that act, which provides that the President is requested to investigate any charge of fraud against the Mexican Government in relation to the award in the case of Benjamin Weil, and if he be of opinion that the honor of the United States or considerations of equity require that the case be retried in such manner as the Gov-
43 ernment of th' United States and Mexico may agree upon, and that in case a retrial is determined upon any money paid by Mexico in respect to the said award shall be held to abide the result of such retrial.

That on the 8th August, 1879, the Secretary of State decided that there was grave doubt of the substantial integrity of the claim of Benjamin Weil, and that the honor of the United States required a further investigation of the claim, and without considering the propriety of invoking the treaty-making powers of the two governments expressly referred to in the law advised that it be referred to Congress for the exercise of its plenary authority in the matter. In support of which allegation your respondent quotes from Mr. Evarts' communication to the President of the 8th August, 1879, the following extracts:

"I am, however, of opinion that the matters brought to the attention of this government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the measure of damages insisted upon and ac-

44 corded in the case of the La Abra Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud.

"If such further investigation should remove the doubts which have been fairly raised upon the representations of Mexico, the honor of the United States will have been completely maintained. If, on the other hand, the claimants shall fail in removing these doubts, or they should be replaced by certain condemnation, the honor of the United States will be vindicated by such measures as may then be dictated. * * * I would advise, therefore, that the proofs and the conclusions you shall come to thereon, if adverse to the immediate payment on these awards of
45 the instalments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter."

Mr. Evarts, in a revision of his opinion on the September of the last year aforesaid, said that the treaty under the provisions of which the commission which made the award in the Weil case was a finality in its action, and said:

"The principle of the settlement of international differences by arbitral commissions is of such deep and wide-reaching interest to civilization, and the value of such arbitration depends so essentially upon the certainty and finality of its decision, that no government should lightly weaken its influence or diminish its consideration by making its action the subject of renewed discussion."

Your respondent, on the contrary, however, respectfully insists that no award is valid and final if obtained by fraudulent means, and that to hold it valid would destroy the value of international arbitration.

46 And your respondent also insists that the proper mode of obtaining a retrial is by invoking the treaty-making power of the two republics.

And your respondent respectfully insists that President Hayes had the perfect right, not only by virtue of his governmental power as representing the executive branch of the Government, but also by virtue of the special power conferred upon him by the section 5th of the act of June 18, 1878, at any time when an instalment from Mexico was to be distributed to withhold such instalment if he became satisfied by further reflection or evidence that the award was the result of fraudulent means; and Mr. Evarts in his final decision of September 3, 1879, approved by the President on September 5, of the same year, expressly by the terms of his opinion reserved this plain right to the President, and said only in reference to the instalment which had then been paid by Mexico and was in his hands, "I am of opinion that it's (the claim's) distributive share
47 of the instalments thus far received from Mexico may be properly paid to the claimants. If this conclusion should receive your approval the payment can be made upon the verification at the Department of State of the right parties to receive it."

And, of course, the same rights which President Hayes possessed belong to the present Executive. The right possessed by the President and recognized by the 5th section was that of a continuing jurisdiction.

And this respondent further respectfully shows to your honors that ev-

idence of the fraud underlying the Weil award has been discovered, and is of much importance in this question, which was never laid before President Hayes, or his Secretary of State.

In May, 1881, President Hayes' decision having been made in Sept., 1879, it became known that addition*al* and important evidence in relation to the claim existed in the Treasury Department tending to establish the conspiracy to defraud Mexico and impose upon the good faith
48 of the United States. Copies of these documents were furnished by the Secretary of the Treasury on the 3rd December, 1881. In sending them the Secretary stated that a portion of the documents had been sent to the Department of State in November and December, 1877. An examination shows that a part and only a part of the documents had been received as stated, but had not been brought to the attention of Mr. Evarts.

This newly-discovered evidence appears to have been unknown to President Hayes and Mr. Evarts, the Secretary of State, when the decision of 1879 was made.

And this respondent respectfully states to the court that the foregoing answer to the said petition is made by the respondent officially in his character of Secretary of State of the United States, by and under the direction of the President of the United States.

FRED'K T. FRELINGHUYSEN.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, John J. Chew, a notary public within and for said district, personally appeared Frederick T. Frelinghuysen, to me personally
49 known as Secretary of State of the United States, and as the respondent who subscribed to the foregoing answer, who, being by me duly sworn, states that the matters and things in said answer stated on his own personal knowledge are true, and the matters and things in said answer stated on information he believes to be true.

In witness whereof I have hereunto set my hand and affixed my notarial seal, this second day of March, 1883.

[SEAL.] JOHN J. CHEW,
Notary Public.

50 In the supreme court of the District of Columbia.

THE UNITED STATES EX REL. JOHN J. KEY)
vs.)
FREDERICK T. FRELINGHUYSEN.)

And now comes the relator, John J. Key, and makes replication of the respondent's answer, which refers to the decision of the President under the 5th section of the act of June 18th, 1878, as communicated to the Senate of the United States in his message of April, 1880, and denies the respondent's statement in his said answer respecting the same to be true; but maintains that the statements made by the relator in his petition as to the President's action are true as in the said petition stated, to wit, that the President did decide that neither the principles of public law nor con-

siderations of justice or equity require or permit as between the United States and Mexico that the awards in these cases should be opened
51 and the cases retried before a new international tribunal or under any new convention or negotiation respecting the same between the United States and Mexico; and further, that after the 4th of March, 1881, did hold and decide that the said award was no longer open to reconsideration, and did proceed in the payment of the same, pro rata, with all other awards under the convention.

And as to all the rest and residue of respondent's answer, the relator both swears and insists that the same is not sufficient in law to require any replication thereto.

JOHN J. KEY.

52 Supreme court of the District of Columbia, sitting in general term, March 16th, 1883.

UNITED STATES EX REL. JOHN J. KEY, PLAINTIFF, *vs.* FREDERICK T. FRELINGHUYSEN, PLAINTIFF. } At law. No. 24076.

Argued by Mr. Solicitor-General Philipps, for defendant; and Mr. Stanton, for the plaintiff, and submitted to the court.

53 Supreme court of the District of Columbia, sitting in general term, March 19, 1883.

UNITED STATES EX REL JOHN J. KEY, PLAINTIFF, *vs.* FREDERICK T. FRELINGHUYSEN. } No. 24076. At law.

Now come here as well the United States upon the relation of John J. Key, by his attorneys, as the defendant, Secretary of State of the United States, by the Solicitor-General of the United States: Whereupon, because It appears to the court here that the demurrer of the relator to the defendant's answer to the alternative writ of mandamus is well taken: Therefore it is considered by the court that the said demurrer be, and the same is hereby, sustained; and that the relator have against the Secretary of State a peremptory writ of mandamus—the cause shown by the said Secretary of State to the contrary notwithstanding—commanding him to pay to the relator, as assignee, of Banjamin Weil, the sum of seven thousand
54 five hundred and ninety-five dollars and thirty-nine cents, out of the money in his custody, awarded to the said Benjamin Weil, under the convention of July 4th, 1868, between the United States and the Republic of Mexico.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a

judgment in a plea which is inthe said court before you, between the United States ex relatione John J. Key vs. Frederick T. Frelinghuysen, Secretary of State, being No. 24076 at law, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 22d day of March, in the year of our Lord 1883, and of the Independence of the United States the one hundred and seventh.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To John J. Key, relator:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Frederick T. Frelinghuysen, Secretary of State, is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Just.*

I acknowledge service herein.

JOHN J. KEY.

56 *Authentication of record.—Clerk's certificate.*

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 5' day of July, 1883.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, No. 3,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 5th day of July, 1883.

D. K. CARTTER, *Chief Justice.* [SEAL.]

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 5th day of July, 1883.

[SEAL.] R. J. MEIGS, *Clerk.*

By R. J. MEIGS, No. 3,
Assistant Clerk.

(Indorsement on cover:) No. 891. Frederick T. Frelinghuysen, Secretary of State, plaintiff in error, vs. The United States ex relatione John J. Key. Dist. of Columbia, supreme court. Filed 6th July, 1883.

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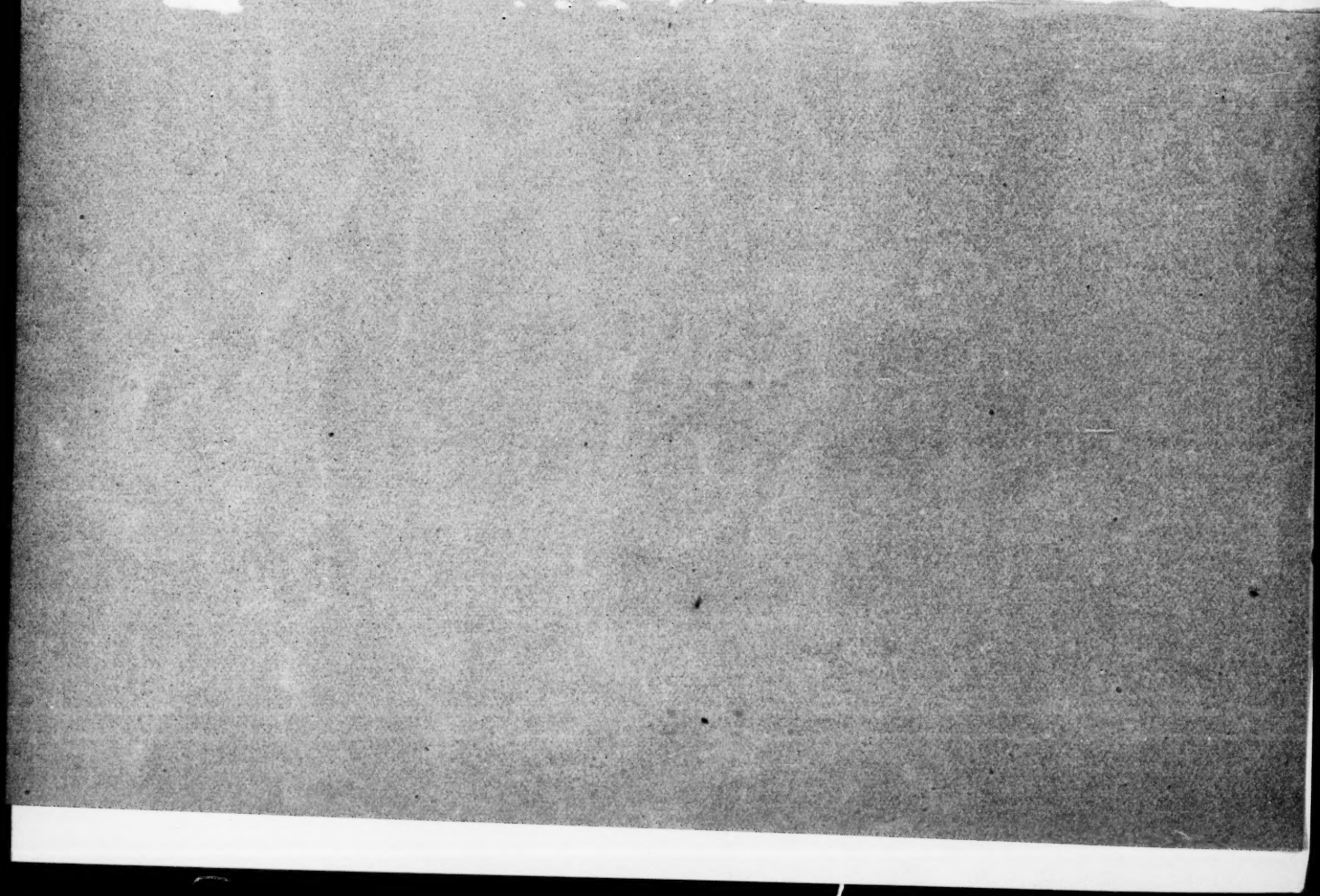
OFFICE SUPREME COURT U.S.
FILED
OCT 9 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

FRELINGHUYSEN, SECRETARY OF State, &c.,
v.
KEY, RELATOR, &c.
} No. 891.

BRIEF FOR THE SECRETARY OF STATE.



In the Supreme Court of the United States.

OCTOBER TERM, 1883.

FRELINGHUYSEN, SECRETARY OF State, &c.,
v.
KEY, RELATOR, &c.
No. 891.

BRIEF FOR THE SECRETARY OF STATE.

This is an application for a mandamus, by Mr. Key as assignee of one Weil, to recover money now in the hands of the Secretary under the act of 1878, ch. 262, (June 18), passed in execution of an award made by virtue of the convention of July 4, 1868, betwixt the United States and Mexico.

The defense, in general, is that the act of 1878 made a special provision for the particular item of award now in question, by which it became the duty of the President to make further investigations into its *bona fides*, and that in consequence of such investigations payment of the money now in hand has by his order been suspended.

The issues are as to the competency, and also as to the

result, of such investigations, the relator claiming that there was no power to institute them; but that if there were, still in fact they were ended favorably to his demand.

More particularly:

The relator sets out that he is the assignee of one Weil a citizen of the United States who in 1868 and before had a claim against Mexico for injuries to property; that afterwards (July 4th, 1868) a convention betwixt the United States and Mexico provided for a commission to consist of two commissioners and an umpire, whose duty it should be to hear and determine such claims; that accordingly Weil's was presented, and was litigated for about six years, when the umpire awarded to him $487,810.68; and that, by the act of 1878, ch. 262 ("An act to provide for the distribution of the awards," &c.), the Secretary of State was required to receive and distribute all moneys paid by Mexico under such award. The relator also states that the act of 1878 provided further that the President should investigate any charges of fraud presented by Mexico against Weil's claim, and that if he should be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require the award to Weil to be reopened, and the case retried, it should be lawful for him to withhold payment thereof until the case should be retried in such manner as the United States and Mexico shall agree, or until Congress should otherwise direct; that he does not admit the power of Congress to make such provision; but, however that may be, it has been fully

executed by President Hayes, who through Secretary Evarts, in 1879 decided that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the award should be opened; although he suggested further that some domestic tribunal, to be established by Congress, ought to inquire whether Weil's claim were not fraudulent; but added that if after this suggestion were communicated to Congress it should not now dispose thereof it would be the duty of the President to accept of the awards as no longer open to reconsideration, and to proceed with their payment; that this conclusion was reported to Congress by the President upon the 15th of April, 1880, and that subsequently, Congress having adjourned without taking action, two different instalments upon Weil's claim (being the 4th and 5th), that had in the years 1880 and 1881 been paid to the Secretary of State, were by the latter paid over to the relator.

The relator thereupon states that a sixth instalment of this award has recently been received by Secretary Frelinghuysen, and that after due demand he has refused to pay the same, &c., &c.

[Senate Executive Document No. 150, second session Forty-sixth Congress which contains the report to Congress by President Hayes, is made a part of the above petition. It is printed in an appendix hereto.]

To the above petition a demurrer was filed, the which

having been argued and overruled, an answer was made by Secretary Frelinghuysen substantially as follows:

That the President, believing that the award on behalf of Weil was obtained by fraud and perjury, has suspended its payment until a new *treaty* with Mexico (which provides for its rehearing, and has already been negotiated), shall have been passed upon by the Senate; and that what has been done by the respondent is in conformity with such order; that the right to negotiate treaties is in nature *executive*, and so is uncontrollable by courts of justice; that President Hayes decided that the Weil claim required a reinvestigation as regards its integrity, and that however it may be that subsequently instalments of that claim have been paid to the relator, yet under the circumstances of the case the question of the propriety of a still further payment arises with every succeeding instalment, so that the President possesses the same power under the act of 1878 that is thereby bestowed upon his predecessor. The answer also avers that important evidence of fraud in the Weil case, never laid before President Hayes or Secretary Evarts, has been subsequently discovered.

In a *replication* the relator denies that the decision of President Hayes was such as is alleged in the answer, and excepts to the sufficiency of all else stated therein.

Article I of the convention of July 4, 1868, authorized

all claims of citizens of the United States against Mexico, and *vice versa*, which arose after February 2, 1848, to be referred to two commissioners, with the usual provision for an umpire.

Article II specified the mode of proceeding, adding:

> The President of the United States of America and the President of the Mexican Republic hereby solemnly and seriously engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decision without any objection, evasion, or delay whatsoever.

Article III provided that claims should be presented within a certain time, and that the commissioners should decide upon them within a certain other time.

Article IV,—that the aggregate of awards in favor of the citizens of the one country should be deducted from that of those in favor of citizens of the other, and the balance paid to the country having the larger amount of claims, in annual sums of $300,000.

Article V,—that the result of the proceedings before the commissioners should be in full of all demands against either Government prior to the ratification of the convention.

Article VI,—that records of the proceedings should be kept, and all expenses should be paid, at specified rates, out of the awards, by ratable deduction, not exceeding five per cent., and any balance by the Governments. (15 Stat., 679.)

The time for decision fixed by the above convention was extended by another convention (April 29, 1876). 19 Stat., 642.)

The act of 1878, ch. 262 (20 Stat., 144), will be found in the appendix.

After argument in the court below, a peremptory writ of mandamus was ordered to issue for the sum of $7,505.37 (folio 53), and thereupon this writ of error was sued out.

That judgment is now assigned for error.

The question raised by this petition for a mandamus against an executive officer turned, as in many other such cases, upon the character of the duty owed by such officer to the petitioner in respect of the thing in controversy.

In order to succeed, the petitioner must show such duty to be *ministerial*.

Inasmuch as the convention of 1868 imposed no duty upon the Secretary of State in respect to the awards which it authorized, and indeed was a transaction to which only the United States and Mexico were parties, it seems that no reliance can be placed upon that as *directly* warranting this proceeding.

Some other action by the United States was requisite before the results of the convention could create as between them and private persons, such rights as might be enforced in courts.

It seems therefore unnecessary to discuss further the

claims which the petition asserts as arising directly under the convention.

It is submitted without further argument that the act of 1878 is necessary to the relief prayed, and that the rights of the petitioner before a court are such only as are thereby given, and consequently must be asserted subject to whatever conditions that statute imposes. But for that the rights of the petitioner to recover from the United States any part of the aggregate sum which they may have received from Mexico upon his account would be only a political right.

Upon perusal the act of 1878 is seen to make special provision for the award, to wit:

After directing (section 1) the Secretary of State to receive from Mexico the whole money awarded, and from time to time as instalments come in to distribute the same ("except as in this act otherwise limited or provided") ratably amongst those in whose favor the awards were made, the act makes (sections 2, 3, and 4) certain provisions not material to be stated here; and then (section 5), after reciting that Mexico had called the attention of the United States to the awards in the cases of Weil and the La Abra Company, requested the President to investigate any charges of fraud in these cases, adding that "if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that such awards should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case

or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct"—in case of such retrial the moneys paid by Mexico to abide the event.

Upon the whole statute, therefore, the provision for *distribution* contained in the first section does not apply to Weil, except either in case the President, after an *investigation*, as authorized in the fifth section, has decided that the award shall not be *reopened and retried;* or in case, after a decision that there should be a retrial, an affirmation of the award has followed.

Inasmuch as in the event there has been no retrial, the petitioner must make out by the record that the President, after investigation, has decided that the original award in favor of Weil should not be reopened and retried.

Upon this matter the Senate document referred to in the petition is important. It shows that upon the 27th of February, 1880, Congress had not been informed what, if any, action the President had taken under the act of 1878 (June 18th); and that in consequence thereof the Senate adopted a resolution making inquiry thereabouts, to which President Hayes replied upon the 15th of April, 1880, transmitting a report by Secretary Evarts to himself made two days before. (See appendix.) In this the Secretary states that Mexico had asserted that there never had been any such property as Weil alleged to have been seized, and that the evidence of the whole claim was spurious and corrupt. The Secretary then refers to a previous

report upon the matter by himself to the President, made upon the 8th of August, 1879, in which he had concluded in substance:

1. That as against the United States, Mexico has no right to complain of the conduct of the claims before the commissioners; and therefore that neither the principles of public law nor considerations of justice or equity required or permitted, as between the two Governments, that the awards should be opened:

2. However, that matters brought to his attention by Mexico do bring into grave doubt the substantial integrity of Weil's claim, and that the honor of the United States does require that it should be further investigated by the United States, and that if upon such investigation such doubts should remain, that honor will be "vindicated by such measures as may then be dictated:"

3. That as the Executive has no means of making such investigation, Congress must supply them, and therefore should be informed of this conclusion.

The Secretary thereupon, after stating that the President had approved of these views, continues: That the parties interested in the awards had from time to time insisted that inasmuch as the President had concluded, as above, that no new *international* trial should be had of the awards in question, the power conferred upon him by the act of 1878 had been exhausted, and payments should no longer be suspended; but that he still adhered to his former conclusion. He then reiterates those views, assigning reasons therefor, and concluding that "unless Congress should now make this disposition of the matter, and furnish thereby definite instructions to the

Department to reserve further payments upon these awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same pro rata with all other awards under the convention."

From this report it is plain that after a deliberation lasting from June, 1878, to August, 1879, the President had concluded that grave doubts as to the integrity in point of substance of the Weil claim did require that it should be further investigated by a tribunal to be established by Congress. This conclusion, after further deliberation until April, 1880, was affirmed, and communicated to Congress. It appears upon its face to have been directly responsive to the duty required by the act of 1878, one alternative in which was to request an opinion from the President whether the *honor of the United States* required that the Weil award should be *retried in such manner as Congress might direct.*

With the expression of this opinion President Hayes became, as it appears, *functus officio* as to Weil's claim, so far as the act of 1878 was concerned.

The further opinion of the Secretary, that unless Congress should *now* make the suggested disposition of the case, it would become the duty of the President to accept the awards as no longer open to reconsideration, and proceed in the payment of the same, was *beyond* the terms of the special commission intrusted to the President by the

act of 1878, and could not affect the force of any opinion given *within* those terms. *A report of the opinion requested remitted the business entirely to Congress, which remained thereupon free to exert its constitutional functions in that connection in such ways and with such delays for deliberation as it might choose; and it seems impossible to maintain that it could be deprived of its discretion, either as to result or as to means, by any hint that if it did not act at once, the President would treat the delay as importing a disagreement with his suggestions.*

This suggestion is pertinent to the meaning attributed upon the other side, and perhaps in the subsequent action of President Hayes, to the word *now* in the last paragraph of Secretary Evarts' report. That meaning may be the true one, although there is some reason for supposing that the word is used in the sense of "now *that this report has been made*," or "now *that the President has performed his especial duty*." After appropriating to himself some twenty-two months in which to make up and communicate his views, the President hardly meant that Congress should *immediately* create a tribunal as requested, and *that* even at the heels of the long session—or otherwise a reasonable conclusion would follow that they did not intend to act all.

I repeat that after making the pertinent portions of the report of April, 1880, the President became *functus officio*. For, although the act of 1878 provided besides, as to *payments*, that in case he should find (as in the event he did), — that "*it shall be lawful* for him to withhold payment of said awards," I submit that it was not intended thereby to give him a *discretion* as to payment, but that, taking the whole

subject-matter in view, the expression above italicised made it his duty to withhold such payment. Congress did not intend to sever action in the way of *payment* from the general conclusion as to fraud in the *title* thereto.

In such case what was done subsequently in the way of paying instalments does not affect the law of this case.

But even if President Hayes were right in thinking that this clause "*it shall be lawful*," &c., conferred such a discretion, it was a *continuing discretion*, arising and renewing with every new instalment that is paid by Mexico; so that President Arthur has a right now to say that, until Congress shall have decided otherwise, *he* will make no further payments from instalments which come into his hands.

But this is not the whole strength of a case in *mandamus*. For *there* the petitioner must show *plainly* that the Secretary has lost all control of the matter. If there be *doubt* whether his acts are not *executive* as distinguished from *ministerial* the application will be denied. If the Secretary has some right to suggest that the legislature has not duly relieved him from official doubts as regards a claim which his predecessor had stigmatized as probably fraudulent, he will not be coerced by mandamus, that being a writ which does not confer or increase, but which merely enforces, some pre-existing authority. If the Secretary have a right to *doubt* before the issue of a mandamus, that right will continue after such issue; or, in other words, in that case the writ is not competent. Competent doubting is a judicial function, and imports *discretion*, which in its turn excludes the application of mandamus.

In this connection it will be observed that President Arthur upon taking office found Weil's award excepted from a general statutory provision for the payment of parties entitled under the convention of 1868, by terms which requested of a former President the determination of certain facts; and further, that such determination had also been made adversely to him. He also found that in addition to the performance of the above request his predecessor had gone on to advertise Congress of what he would do outside of the duty which had been imposed upon him by Congress in case it did not at once (say) act upon his suggestion thereabouts, and that Congress having failed so to act he had so done; and perhaps, also, that in the early and troubled days of President Garfield the same thing, in deference to that precedent had occurred again. The question therefore is whether this state of things did not present a matter upon which President Arthur might well doubt, and await action by the legislature, *i. e.*, action by the treaty-making power, or by Congress. Might he not well ask himself, "Where is the legislation which authorizes this instalment to be paid to Weil's representatives?" and, after making search, hesitate to believe that the above notification by President Hayes constituted such warrant?

If in the nature of things the responsive portion of President Hayes's report required actual legislation by Congress supplementary to the act of 1878—as seems clearly to be the case—could a notification like that under consideration be a constitutional substitute therefor? If not, can the precedents of action under such ratification satisfy reasonable scruples upon the part of a succeed-

ing President? Upon the contrary, may it not be his duty to recall the action of the Executive Department to the standard of existing *laws?* Was President Hayes's notification to Congress such a transaction as under the Constitution created a competent rule of duty not only for himself but for his successors?

It appears upon the face of the act of 1878 that Congress was then of opinion that in case the President should find the facts as to Weil's award in the way that he in the event did, an *international* retrial of the case might be competent. However President Hayes, for reasons irrespective of the character of that claim, thought that such a retrial would be inadvisable, and so reported. In his view a domestic tribunal was to be set up for that purpose.

This suggestion seems to have created some difficulty before Congress. (See Appendix.) In the Senate a bill was introduced in conformity therewith, referring the matter to the Court of Claims, but after a report by the Committee on the Judiciary that such suggestion was ill-founded, no action was had. In the House, the same proposition was favorably reported upon, but this bill also was allowed to drop. No action was taken in either House. Nor has there been since.

In this connection it is submitted that, admitting, at least for the argument's sake, that the *request* to the President contained in the act of 1878 was one that was to be executed once for all by President Hayes, and could not be reconsidered for the purposes of that act by any of

his successors, yet an expression of his opinion as to the unadvisableness of *international* action was no part of the commission so intrusted to him, but was a matter of mere general Executive communication, which might at any time be reconsidered and changed by himself, or by a successor, so long as Congress had not acted either affirmatively or negatively upon his opinion as to what was required by the *honor* of the United States.

The circumstances which have passed in the mean time have left this matter still open. In consequence thereof, President Arthur, differing from the conclusions of President Hayes, has opened negotiations with Mexico for a treaty. This treaty has also been formulated and communicated to the Senate for its action. It still pends there.

I submit that if, under the peculiar circumstances attending the action of the Executive in this case, as above detailed, a bill were pending to determine the matter, and having passed either branch of Congress, were within the constitutional term of deliberation upon bills before the other for its action, or, having passed both houses was before the President for approval, it would be incompetent to disturb this deliberative condition of things by mandamuses. If this be so it must be equally true as regards a treaty to which the President has agreed, and which within the constitutional period of incubation is awaiting determination by the Senate.

It is unnecessary, under the exceptional circumstances of this case, to consider how far in general courts may interfere with projected legislation that has received so much countenance as is above supposed. It may be granted

that rights of action otherwise clearly existing cannot be affected by legislation of any sort merely inchoate. That is not the case here; for this is a case in which a high executive officer finds that a matter of importance which requires administration by him has been complicated by previous Executive action seemingly in conflict with any legislation thereupon. If it were true—as seems extremely doubtful—that even in such case without more, the petitioner would be entitled to a mandamus, can it be that in case other legislation going to show that doubt to have been well founded, has been resorted to, and having passed an important constitutional stage, is pending, still concurrently, the extraordinary writ of mandumus is competent?

As a distinct proposition, which is pertinent in this immediate connection, I submit that, *in respect of comity alone*, in cases where proposed legislation has received such sanction as that (the treaty) has done now under consideration courts will not interfere with the statu quo of matters directly and specifically aimed at by such legislation.

It may be well to advert here to the particular features of two cases in which this court, administering the well-known distinctions betwixt *executive* and *ministerial* action, has *denied* applications for this writ.

In the *Decatur* case, 14 Peters, 497, it appeared that upon one and the same day Congress had passed a general act giving pensions to widows of naval officers, and also a

special one giving a pension to Mrs. Decatur. Mrs. Decatur claimed rights under both acts, this her claim had been rejected by Secretary Dickerson, and again upon a renewal thereof, by Secretary Paulding, his successor. This latter rejection occasioned an application for a mandamus.

The court, after calling attention to the distinction betwixt executive and ministerial duties, said:

> The case before us illustrates these principles, and shows the difference between executive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the Secretary was obliged to determine whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment in deciding whether the half-pay allowed her was to be calculated by the pay proper, or the pay and emoluments of an officer of the commodore's rank.
>
> And after all this was done, he must have inquired into the condition of the Navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it; and if not money enough, how it was to be apportioned among the parties entitled. A resolution of Congress requiring the exercise of so much judgment and investigation can with no propriety be said to command a mere ministerial act to be done by the Secretary.

In the present case Secretary Frelinghuysen has been called upon to revise action by a predecessor, and to construe the aggregate effect of a complicated governmental transaction partly legislative and partly executive, and thereupon to say officially what the claimants' rights are, not only under the statutes but under the subsequent report and the still later modifying action of the Executive.

In *Seaman's* case (17 How., 225) a portion of the Patent Report had become a Senate Document, and had been ordered to be printed by that body; a part of the same report, returned later, became a House Document, and had there been ordered to be printed. The Senate printer thereupon applied for a mandamus ordering the latter parts to be given to him. The court said that the necessity under which, by law, the superintendent was of making inquiries,—as to the House in which the order was first made; the usages of Congress in making communications to them, *documents;* and whether according to such usage the papers in question constituted *one* document or *two*, required a *discretion* which could not be controlled by mandamus.

These cases illustrate the rule in Guthrie's case, 17 How., 284, laid down at the same term in which Seaman's case was decided, viz: "That the only acts to which the power of the courts by mandamus extends are such as are *purely* ministerial, and with regard to which *nothing like judgment or discretion* in the performance of his duties is left to the officer." (See also Gaines's case, 7 Wall., 347.)

In Decatur's case that which required an exercise of discretion was not the meaning of the particular statute which had been adopted as applicable, but the preliminary question whether two statutes or only one constituted the rule of action. So here, if all the trouble in which the Secretary finds himself is whether he shall be governed by the statute of 1878 and the report of the President in response thereto, or whether by the subsequent *action* of the Executive, there is equally room for discretion.

Upon the whole matter it is submitted that the Secretary cannot be coerced by a writ of mandamus—

1. Because the petitioner has no title to the money that can be recognized by a court.

2. At all events, because, under the circumstances, the duty of the Secretary in passing upon the right is executive, and not ministerial.

3. As a distinct objection, *that in respect of comity alone* courts will not interfere with the statu quo upon which pending legislation having a specific reference to that status is intended to operate.

S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

I.

ACT OF 1878, CHAP. 262.—AN ACT to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, eighteen hundred and sixty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State be, and is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims concluded July fourth, eighteen hundred and sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six, and whenever and as often as any instalments shall have been paid by the Mexican Republic on account of said awards to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And in making such distribution and payment due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable; and the proportionate amount of any award of which, by its terms, the United States is entitled to retain a part shall be deducted from the payment to be made on such award, and shall be paid into the Treasury of the United States as a part of the unappropriated money in the Treasury.

SEC. 2. That out of any moneys in the Treasury not otherwise appropriated a sufficient sum is hereby appropriated to enable

the Secretary of the Treasury to pay to the Secretary of State of the United States, in gold or its equivalent, the equivalent of fifty thousand five hundred and twenty-eight dollars and fifty-seven cents in Mexican gold dollars, and ten thousand five hundred and fifty-nine dollars and sixty-seven cents in American gold coin, and eighty-nine thousand four hundred and ten dollars and seventeen cents in United States currency, said sums being the aggregate in said currencies respectively of the awards made under the said convention of July fourth, eighteen hundred and sixty-eight, in favor of citizens of the Mexican Republic against the United States, and having been deducted from the amount awarded in favor of citizens of the United States, and payable by Mexico, in accordance with article four of the said treaty; and that said sums, when paid to the Secretary of State, as aforesaid, shall be regarded as part of the awards made under the said treaty, to be paid or distributed as herein provided.

SEC. 3. That out of the payments and instalments received from Mexico, as aforesaid, on account of said awards, and out of the moneys which shall be received by the Secretary of State under the provisions of this act, the Secretary of State shall, when and as the same shall be received and paid, and before any payment to claimants, deduct therefrom and retain a sum not to exceed five per centum of said moneys awarded to citizens of the United States, until the aggregate of the amounts so deducted and retained shall equal the sum of one hundred and fourteen thousand nine hundred and forty-eight dollars and seventy-four cents, being the amount of the expenses of the commission, including contingent expenses paid by the United States in accordance with article six of the treaty, as ascertained and determined in pursuance of the provisions of the said treaty; which said sums, when and as the same are deducted and retained, shall be, by the Secretary of State, transmitted to the Secretary of the Treasury, and passed to the account of and be regarded as unappropriated money in the Treasury.

SEC. 4. That in the payment of money, in virtue of this act, to any corporation, company, or private individual, the Secretary of State shall first deduct and retain or make reservation of such sums of money, if any, as may be due to the United States from any corporation, company, or private individual in whose favor awards shall have been made under the said convention.

SEC. 5. And whereas the Government of Mexico has called the

attention of the Government of the United States to the claims hereinafter named with a view to a rehearing, therefore be it enacted that the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision any moneys paid or to be paid by the Republic of Mexico in respect of said awards, respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them. (20 Stat., 144.)

II.

Message from the President of the United States communicating, in compliance with a resolution of the Senate of the 27th of February last, information concerning certain awards made by the late United States and Mexican Commission.

APRIL 16, 1880.—Referred to the Committee on Foreign Relations, and ordered to be printed.

To the Senate of the United States:

In response to the resolution of the Senate of the 27th of February last, concerning the action had by the Executive with respect to the investigation of certain cases in which awards were made by the late United States and Mexican Commission, I transmit herewith a report of the Secretary of State, to whom the matter was referred.

R. B. HAYES.

WASHINGTON, *April* 15, 1880.

DEPARTMENT OF STATE,
Washington, April 13, 1880.

To the President:

The Secretary of State, to whom was referred the following resolution of the Senate of the 27th of February, 1880—

"*Resolved*, That the President be requested, if in his opinion not inconsistent with the public service, to inform the Senate what action, if any, has been taken by him under authority of section 5 of the act approved June 18, 1878, entitled 'An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868,' and of the grounds of such action, and what further action, if any, the honor of the United States may, in his opinion, require to be taken in the premises"—

Has the honor to report:

The act passed by Congress "to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th day of July, 1868," contained the following section:

"SEC. 5. And whereas the Government of Mexico has called the attention of the Government of the United States to the claims hereinafter named with a view to a rehearing, therefore be it enacted that the President of the United States be, and is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payments of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct; and in case of such retrial and decision any moneys paid or to be paid by the Republic of Mexico in respect of said awards, respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression

of any opinion of Congress in respect to the character of said claims, or either of them."

It having been referred by you to the Department of State to institute the investigation required by this action, I gave the subject the most careful examination. I reviewed the proceedings of the commission, including the testimony originally submitted, the arguments made by the counsel both for the Republic of Mexico and the United States, the opinions of the members of the commission, and the final decision of the umpire. I considered the representation of the Mexican Government as set forth in its diplomatic communications to this Department, and subjected to patient scrutiny the supplemental evidence by which those representations had been supported. In addition to this, I heard counsel both for the Mexican Government and the parties interested in these awards.

The most impressive complaint of the Mexican Government in the La Abra case bore upon the award of damages as fraudulently exaggerated.

In the Weil case, the Government of Mexico asserts that no such case has ever had any real existence; that there never was any such property as is alleged to have been seized; that the parties claimant never owned, directly or as agents, any such property; that the seizure of the property is in all its details a pure fiction, and that the evidence by which the whole claim is established is spurious and corrupt.

Upon these complaints, and the examination given to them as above set forth, on the 8th of August last I reported to you my conclusions as to the proper disposition of the matter by the executive government, as follows:

"First. I am of opinion that, as between the United States and Mexico, the latter Government has no right to complain of the conduct of these claims before the tribunal of commissioners and umpire provided by the convention, or of the judgments given thereupon, so far as the integrity of the tribunal is concerned, the regularity of the proceedings, the full opportunity, in time and after notice, to meet the case of the respective claimants, and the free and deliberate choice exercised by Mexico as to the methods, the measure, and the means of the defense against the same.

"I conclude, therefore, that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the awards in these cases should

be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same, between the United States and Mexico.

"Second. I am, however, of opinion that the matters brought to the attention of this Government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of the La Abra Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud.

"If such further investigation should remove the doubts which have been fairly raised upon the representations of Mexico, the honor of the United States will have been completely maintained. If, on the other hand, the claimants shall fail in removing these doubts, or they should be replaced by certain condemnation, the honor of the United States will be vindicated by such measures as may then be dictated.

"Third. The executive government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses. The authority for such an investigation must proceed from Congress. I would advise, therefore, that the proofs and the conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the installments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter.

"Fourth. It may be that, as the main imputation in the case of the La Abra Silver Mining Company is of fraudulent exaggeration of the claim in its measure of damages, it may consist with a proper reservation of further investigation in this case to make the distributions of the instalments in hand.

"I have this subordinate consideration still under examination, and, should you entertain this distinction, will submit my further conclusions on this point."

These conclusions have been approved by you, and the point reserved for further consideration in the La Abra case having again

been referred to me, on the 3d of September last I reported to you my conclusions upon the same, as follows:

"The parties interested in the case of the La Abra Mining Company having desired from you a further consideration of the point reserved in my former statement to you of my views in that case, and the matter having been referred to me to that end, I respectfully submit my conclusion on that point.

"1. Upon a renewed examination of the matter as laid before me by the Mexican Government I am confirmed in the opinion that the proper limits of the further consideration which the honor of the Government should prompt it to give to this award should confine the investigation to the question of a fraudulent exaggeration of the claim by the parties before the commission to which, under the provisions of the convention, it was presented by this Government.

"2. Upon a careful estimate as to any probable or just reduction of the claim from further investigation, should Congress institute it, and under a sense of the obligation of the executive government to avoid any present deprivation of right which does not seem necessary to ultimate results, I am of opinion that its distributive share of the instalments thus far received from Mexico may properly be paid to the claimant, reserving the question as to later installments.

"If this conclusion should receive your approval the payment can be made upon the verification at the Department of State of the rightful parties to receive it."

This latter conclusion having also received your approval, and the results stated in both these reports having been communicated both to the Mexican Government and the claimants, the payment was made upon the La Abra award of the distributive share of the instalments then in hand, and payment was withheld of the distributive share of such instalments upon the Weil award.

The parties interested in these awards have from time to time preferred requests for a renewed consideration by the Executive of the questions arising for his determination under the act of Congress of June 18, 1878, and have particularly insisted that, in deciding against opening these awards diplomatically and re-examining them by a new international commission, the whole discretion vested in the Executive as a part of the treaty-making power and under the special provision of the act of Congress was exhausted,

and that the payments should be no longer suspended in respect of these cases, or either of them. A solicitous attention to the rights of the claimants and the duty of the Executive in the premises has confirmed me in the opinion that Congress should determine whether "the honor of the United States" requires any further investigation in these cases, or either of them, and provide the efficient means of such further investigation if thought necessary.

In the conclusions to which I came, and which I had the honor to submit to your examination, I was principally governed by the following considerations:

1. In the complaints of the Mexican Government there is not the slightest impeachment, express or implied, of the character or composition of the commission, of its methods of procedure, or of the entire regularity and integrity of its actual proceedings. It was composed of able and eminent men, enjoying the full confidence of the Governments by whom they were respectively appointed, and the umpire selected, Sir Edward Thornton, was pre-eminently fitted for his laborious and responsible duties by his long diplomatic experience, his recognized ability, his high character, and his special knowledge of the two countries whose citizens and Governments were interested in the arbitration.

2. Before this commission the Government of Mexico had full opportunity and ample time to present its defense, both in evidence and argument, against any claim that was submitted. In the La Abra case a large amount of testimony was taken on both sides, the comparison and valuation of which was within the power of the commission, and the opinion of the umpire shows that it was carefully considered.

In the Weil case it is true that the Mexican Government submitted no testimony, and that the case was decided upon the evidence offered by the claimants. But the Mexican commissioner explicitly declined the offer of further time to produce such testimony, although he professed that his Government had such in possession, saying upon the trial:

"There is in the present case the still more serious consideration that there is sufficient evidence upon which to judge of the claim, and that by opening the door to new testimony it would only serve to show the claimant wherein the edifice which he had erected upon his imagination was weak, and by enlightening him how to

crown his intrigue by new efforts, which, although they would not change the aspect of the case, might lead him to confirm it."

3. The treaty under the provisions of which the commission was appointed was explicit in recognition of the finality of its action. By Article II of that convention the two Governments bound themselves to consider the decisions of the commissioners and of the umpire as absolutely final and conclusive, and to give full effect to such decisions without any objection, evasion, or delay whatsoever; and by the fifth article the high contracting parties agree to consider the result of the proceedings of the commission as a full, perfect, and final settlement of every claim upon either Government arising from the transactions prior to the exchange of ratifications thereof.

4. Aside from this special provision of the finality of the decision of the commission, in the very act of its creation, it would seem impossible to review and retry any individual case without opening the door to other reclamations of the same sort. In addition to these cases, with the result of which the Mexican Government is dissatisfied, there are many others which failed of preparation in time, which were rejected on principles not always acquiesced in by those interested, and some in which the claimants deemed the awards very insufficient. The adherence of the Government of the United States to the strict letter of its convention, that the decision of the commissioners should be absolutely final in every case and a complete bar to any claim arising from transactions prior to its ratification, has hitherto prevented any effort on the part of this Government to renew such discussion in favor of its citizens. But if it be once admitted that for any reason short of an impeachment of the integrity of the commission its proceedings can be reopened for review and its decisions for reversal, there will not be wanting numerous urgent appeals to the justice and sympathy of the Government to extend this measure of relief to many who think that their claims have been erroneously estimated or rejected.

Lastly. The principle of the settlement of international difference by arbitral commissions is of such deep and wide-reaching interest to civilization, and the value of such arbitation depends so essentially upon the certainty and finality of its decision, that no government should lightly weaken its influence or diminish its consideration by making its action the subject of renewed discussion. It is only in extreme cases, where the commission is itself

charged with corruption, or where it has clearly exceeded its powers in deciding matters not submitted to its judgment, that prompt and cheerful acquiescence should not be rendered to its action. No such charge is here suggested. It may be true that in this or that instance more adequate justice might have been rendered. The methods and processes of such tribunals, which in time it may be confidently hoped will be improved and perfected, are not yet so complete as to eliminate much opportunity of error. But the results of such an arbitration, covering, as this did, large, complicated, and numerous transactions, deciding not upon oral testimony winnowed by cross-examination, but upon the contradiction of vague affidavits, cannot be fairly judged by the apparent errors of this or that individual case. There is, probably, no just ground for saying that the aggregate of the awards against Mexico more than equaled the just claims of our citizens, and much complaint has been made that such aggregate falls quite short of them. But the awards made by this commission were something more than the settlement of mere private claims—it was the adjustment of long standing national differences. And if in the result more or less was added to or taken from particular awards, still, if on the whole a fair and just balance has been struck, if, considering all that has been given, and all that has been refused, the examination has been careful and the judgment impartial, it is the interest and the duty of governments to maintain it.

While these considerations led to the conclusion that these cases ought not to be made the subject of a new international commission, I was yet of opinion that "the honor of the United States" was concerned to inquire whether in these cases submitted by this Government to the commission its confidence had been seriously abused, and the Government of Mexico, acting in good faith in accepting a friendly arbitration, had been subjected to heavy pecuniary imposition by fraud and perjury in the maintenance of these claims, or either of them, before the commission. In furtherance, however, of this opinion it seemed to me apparent that the Executive discretion under the act of Congress, could extend no further than to withhold further payments on the awards until Congress should, by its plenary authority, decide whether such an investigation should be made, and should provide an adequate

procedure for its conduct, and prescribe the consequences which should follow from its results.

Unless Congress should now make this disposition of the matter, and furnish thereby definite instructions to the Department to reserve further payments upon these awards till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same pro rata with all other awards under the convention.

WM. M. EVARTS.

III.

IN THE SENATE OF THE UNITED STATES.

JUNE 10, 1880.—Ordered to be printed.

Mr. MCDONALD, from the Committee on the Judiciary, made the following report: [To accompany bill S. 1682.]

The Committee on the Judiciary, to whom was referred the bill (S. 1682) entitled "An act directing the Court of Claims to investigate the claims of Benjamin Weil and La Abra Silver Mining Company," make the following report:

The fifth section of the act approved June 18, 1878, entitled "An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th of July, 1868," is as follows: [See Appendix, I.]

In adding this section to the act providing for the distribution of the awards it was not the purpose of Congress to pass upon the character of the claims referred to in it, as the proviso attached to said section expressly declares. By authorizing the instalments payable to these claimants under the treaty to be withheld in the discretion of the President if, upon investigation of the charges of fraud presented by the Mexican Government against such claims, "he should be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, required that the awards in these cases, or either of

them, should be opened and the cases retried," it was intended, so far as legislative authority might be requisite, to release the executive department from the absolute obligations of the award, and to authorize such examination by the executive department into the complaints of the Mexican Government as would enable the President to pass upon the questions raised by them; and if "the honor of the United States, the principles of public law, or considerations of justice and equity," required a retrial of these cases, or either of them, then and in that case to initiate with the Mexican Government such convention or stipulations as would provide for the retrial under such regulations as would secure the ends of justice and vindicate the honor of the United States.

It appears from the message of the President of the United States, of April 15, 1880, transmitting a report of the Secretary of State, to whom the matter embraced in the section above quoted was referred, that no definite conclusions had been arrived at by the executive department upon the questions involved in said section. That report is as follows:

[See Appendix, II.]

It will be seen from this report, with respect to La Abra mining claim, the principal ground of complaint is exaggeration of damages, and upon that question it does not appear that any fault whatever attaches to the commission before whom it was examined, nor to the referee by whom it was affirmed. It also appears that the Department of State so far passed upon the question of excessive damages as to determine the claimants to be entitled to the instalments already paid in, and that the Executive had directed the amounts to which the claimants were thus entitled to be paid over; and while the remaining instalments not yet received may be regarded as subject to retention to meet the question of a reduction of damages, it virtually determines the question submitted to the executive department by the said 5th section, so far as that claim is involved.

In regard to the Weil claim, the case presents one of greater difficulty. It appears from the report of the Secretary that this claim is charged by the Mexican Government to be a complete fabrication; that this charge was made before the commissioners at the time it was undergoing investigation. The representative of Mexico claimed to be in possession of evidence then to establish the charge, but declined to introduce it, preferring to rest the case on the

evidence introduced by the claimant, but sought afterwards to introduce such impeaching testimony before Sir Edward Thornton, the referee, who declined to receive it, holding, and correctly, that no new evidence could be introduced on the hearing before him, and that upon the evidence submitted to the commissioners he could not do otherwise than to affirm the claim.

In the investigation that has taken place in the State Department, under the authority of the fifth section above quoted, no suggestion appears in the report of the Secretary "that the honor of the United States, the principles of public law, or the considerations of justice and equity require that this case should be retried," but, on the contrary, after stating considerations of public policy which would seem to forbid the reopening of the case, the questions of honor, principles of public law, and considerations of justice and equity are referred to Congress to decide. This would involve an investigation by Congress of facts of an international character which, in the opinion of the committee, properly belongs to the executive department, and which it was the intention of the fifth section of the act of June 18, 1878, to leave with the Department.

The bill under consideration proposes to withdraw these two claims from the dominion of international jurisdiction and place them before a tribunal organized and existing solely by virtue of the laws of this country, and in this way it would seem designed to avoid the opening up of other questions of complaint that are known to exist on behalf of citizens of the United States whose claims, for various causes, fail to receive favorable consideration by said commission under the treaty creating the commission.

The second article of that treaty bound the two Governments absolutely and conclusively by the final awards of the commission and umpire in all cases coming within its provisions; and it would seem right that if it is to be set aside as to any of the claims it ought to be by a new convention, in which provision should be made for doing justice to all claimants.

The reasoning of the Secretary of State against the propriety of such a course as this would seem to be unsatisfactory; but, in the aspect these cases are presented to us, we feel constrained to report back said bill adversely, and recommend its indefinite postponement.

IV.

HOUSE OF REPRESENTATIVES.

JUNE 9, 1880.—Referred to the House Calendar and ordered to be printed.

Mr. COX, from the Committee on Foreign Affairs, submitted the following report: [To accompany bill H. R. 6452.]

The Committee on Foreign Affairs, to whom was referred the bill (H. R. 4899) to amend the act approved June 18, 1878, relative to the awards of the Mexican Commission, having had the same under consideration, beg leave to report, as a substitute therefor, the accompanying bill.

On the 18th of June, 1878, Congress passed an act "to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the 4th of July, 1868," the fifth section of which is as follows: (See Appendix, I.)

Under authority of this act the Secretary of State, to whom the matter was referred by the President, invited the Government of Mexico to submit the proofs on which it relied to support the charges of fraud, and, after considering those proofs and the arguments of counsel for Mexico and for the claimants, reported to the President, on the 8th of August, 1879, as follows:

"First. I am of opinion that, as between the United States and Mexico, the latter Government has no right to complain of the conduct of these claims before the tribunal of commissioner and umpire provided by the convention, or of the judgments given thereupon, so far as the integrity of the tribunal is concerned, the regularity of the proceedings, the full opportunity, in time and after notice, to meet the case of the respective claimants, and the free and deliberate choice exercised by Mexico as to the methods, the measure, and the means of the defense against the same.

"I conclude, therefore, that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico.

"Second. I am, however, of opinion that the matters brought to the attention of this Government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil and the sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of the La Abra

Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud.

"If such further investigation should remove the doubts which have been fairly raised, upon the representation of Mexico, the honor of the United States will have been completely maintained. If, on the other hand, the claimant shall fail in removing these doubts, or they should be replaced by certain condemnation, the honor of the United States will be vindicated by such measures as may then be dictated.

"Third. The executive government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses. The authority for such an investigation must proceed from Congress. I would, advise, therefore that the proofs and the conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the installments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter.

"Fourth. It may be that, as the main imputation in the case of the La Abra Silver Mining Company is of fraudulent exaggeration of the claim in its measure of damages, it may consist with a proper reservation of further investigation in this case to make the distribution of the installments in hand.

"I have this subordinate consideration still under examination, and, should you entertain this distinction, will submit my further conclusions on this point."

September 3, 1879, the Secretary made a supplemental report, as follows:

[This extract has reference exclusively to the La Abra claim, and therefore is omitted here. It appears in Appendix, II, page , beginning "The parties interested in the La Abra case," &c.]

These reports having been approved by the President and published in the press of August and September, were communicated to Congress with a message of the 15th of April, 1880, in response to a resolution of the Senate of the 27th of February.

The bill before this committee (H. R. 4899) contemplates the release of Mexico from the payment of these claims, and cannot be acted upon without an inquiry into their merits, which the com-

mittee, at this late stage of the session, has not the time to undertake. The committee believe that the investigation required by the honor of the United States can be most justly and exhaustively conducted by a judicial tribunal, possessed of the plenary powers to "coerce the production of evidence and compel the examination of parties and witnesses, which, in the opinion of the Secretary, are essential to a satisfactory examination of these cases; and the matter having assumed the shape of a question between the United States and the claimants, they report a substitute for the bill referred to them, by which the Court of Claims is directed to make the investigation, proceeding as in the case of a new trial of claims against the United States granted on the ground of newly discovered evidence.

So far as the committee are informed the proofs filed in the State Department have not yet been laid before Congress as recommended by the Secretary of State in his report of August 8, 1879. The committe, do not, therefore, know the grounds on which the Secretary based the estimate which, in his report of September 3, he says he has made, "as to to any probable or just reduction of the claim [of La Abra Mining Company] from further investigation," but these grounds will doubtless appear to the Court of Claims, to which the whole case is committed by the bill now reported.

The act of 1878 provided that if the President should "be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct." The President having recommended a method of investigation and practical opening of the awards upon which it is not necessary that the United States and Mexico should agree, payment of the money to the claimants is necessarily suspended "until Congress shall otherwise direct." The committee have therefore provided in the bill which they now report for the payment to the claimants of such portions of their claims as the court may decide to be justly due, and have limited the time of the trial to one year from the passage of the bill.

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JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

FRELINGHUYSEN, Secretary of State,
Plaintiff in Error,

v.

UNITED STATES, on relation of JOHN J. KEY, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

BY

R. B. WARDEN.

BERESFORD, PR.

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UNITED STATES, ON RELATION OF JOHN J. KEY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

BY

R. B. WARDEN.

BERESFORD, PR.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

FRELINGHUYSEN, *Secretary of State, &c.*,
891 *vs.*
KEY, *Relator, &c.*

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

A.

Preliminary Statement.

As there is on file already, a Brief stating the Case on behalf of the Defendant in Error, and as there is also a statement of the Case in the Brief of Mr. Solicitor General, there seems to be no need of a full statement here. Apart from the argumentative part of the statement in the Brief last mentioned, I take no exception to the preliminary showing, furnished by that Brief. As to the matter which it puts into an Appendix, while I deem parts of it capable of misleading, and the whole of it incapable of giving a full view of the history which I would like to have before the Court, and which the Court itself, I am quite sure, would wish to see thoroughly as possible, I am more than willing that Judicial Notice shall here be extended to the matter so appended, and to all other matter which Judicial Notice can be deemed to reach.

B.

Argument in Brief.

I. Consulting brevity as much as possible in view of the great depth, and height, and breadth of questions which this Record raises, I avail myself of reference to words of mine, addressed to the Secretary of State, in a Brief, by Judge Johnston and myself, on learning, *not officially*, that there appeared to be probability of negotiation—in point of fact, unknown to us, there had already *been* negotiation—of a Treaty, such as that, the seeking of ratification for which the Secretary sets up in his remarkable Answer to Mr. Key's Petition for Mandamus. In that Brief are these expressions, which I certainly drew up with good intention:

"We have learned that disturbance of the decision made by President Hayes, under the fifth section of the act, entitled 'An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the fourth day of July, eighteen hundred and sixty-eight,' has been contemplated. We insist, that no disturbance of that decision ought to be made, in any way. We submit, that it is final and conclusive, right in itself, and within the application of the rule respecting *res judicata;* and that the rights vested under it are property, which no power is at liberty to touch.

"The fifth section of that act recites that the government of Mexico has called the attention of the government of the United States to the claim of Benjamin Weil and the claim of the La Abra Mining Company, with a view to rehearing. It requests the President to investigate any charges of fraud, presented by the Mexican Government as to those cases; and thereupon it provides that, if the President shall be of the opinion that *the honor of the United States, the principles of public law,* or *considerations*

of justice and equity, require that the awards in those cases, or either of them, should be opened and the cases retried, *it shall be lawful* for him to withhold payment until such case or cases shall be retried and decided, *in such manner as the governments of the United States and Mexico may agree*, or *until Congress shall otherwise direct.*

"The President acted in accordance with that request of the Congress. He exhausted all the power, and performed the whole duty, contemplated by the act. He decided that neither the honor of the United States, the principles of public law, nor considerations of justice and equity, either *required* or *permitted* the opening of the awards in question and the retrial of the cases, or either of them.

"This was after more than one hearing, and after the completest advisement; and we say it is a perfect bar to any sort of disturbance of the Awards, and is, moreover wholly right in itself.

"Five installments of the payment to be made under the Awards have been actually paid, under that decision, and another is now waiting to be paid.

"Among the rights vested under the proceedings just referred to, are the rights of assignees, in no way affected by the allegations of fraud. These assignees had, and have, a perfect right to regard the whole matter as having been legally and forever put at rest by the Presidential decision, here set forth and pleaded as a bar.

"It is to be observed that some of the assignees became such *after* the decision of the President, quieting the whole attempt of Mexico to go behind the Award.

"When the history of the whole matter is reviewed with care, there cannot be the slightest doubt that the decision of the President, that the suspended installments of payment ought to be delivered to the persons interested, and the whole attempt to interfere with the Awards pronounced against, was a decision absolutely right. We

are not called upon to make this out; but we think proper, nevertheless, to take that easy task upon ourselves."

I also said in the same argument:

"But Congress saw fit to pass the already-cited Act, to call on the President to examine whether either the honor of the United States, the principles of public law, or considerations of justice and equity, required that the assailed awards should be opened, and the cases retried.

"In accepting the trust so reposed in him, President Hayes, an able, experienced, and solid Lawyer, took upon himself the decision of matters of Law and matters of Fact alike. He referred to the distinguished and accomplished Lawyer, who was then Secretary of State, the hearing of oral and other argument, for and against what was so coolly asked by Mexico.

"The hearing was a full one; the consideration of the Secretary long protracted.

"Some of the considerations of law which were presented on the side of the Awards, were, in substance, these:

"1. The case of the *United States* v. *Throckmorton* (*a*) is conclusively against what is demanded on the part of Mexico. In that case Mr. Justice Miller says:

"'There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments. There is also no question that many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of the law—no longer open to inquiry in the usual and ordinary methods. Of this class are judgments and decrees of a Court deciding between parties before the Court and subject to its jurisdiction, in a trial which has presented the claims of the parties, and

(*a*) 98 United States, (8 Otto,) 61.

where they have received the attention of the Court. . . . But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from Court; a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

"Mr. Justice Miller, after citing cases, adds: 'In all these cases, and in others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the Court. On the other hand, the doctrine is equally well settled that the Court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.'

"The rule so settled is completely applicable to Awards, without excepting International Awards.

"2. Indeed, there are many, constantly augmenting reasons, growing out of International Relations, as to War and Peace, for holding International awards completely indisturbable.

"3. These reasons rise above, but they include, the

Private Interests affected by the Arbitrations of the Nations.

"4. The proprietary interest of Private Persons in International Awards is of great concern to international welfare as well as to individual affairs.

"5. The actual existence of the alleged proprietary interest of individuals, and its inviolability, are shown in *Comegys* v. *Vasse*, (*a*,) *Mead's Case*, (*b*,) and the opinion of the Attorney-General in *Gibbs' Case*, (*c*,) as well as in *Judson* v. *Corcoran*, (*d*,) and in *Gracie* v. *N. Y. Ins. Co.* (*e*.)

"6. On all accounts Public Policy, in all its aspects, home and foreign, is opposed to disturbance, under any pretext, of an International Award.

"7. The pretexts here are shown by the whole history of the proceedings of Mexico to be frivolous and worse than frivolous. She had the amplest 'day in court,' and would not take it; and is now attempting, in effect, to have advantage of her own gross negligence, and of a craft which ought to be condemned with great severity.

"8. What Mexico is praying for is not only not *required*, it is not even *allowed*, by 'the honor of the United States,' by 'the principles of public law,' or by 'considerations of justice and equity.'

"9. The legal 'honor' does not act on the principle that the end justifies the means. That honor does not hold that it is well to do evil in order that good may come. That honor hates all the varieties of lawlessness, but especially the lawlessness that pretends to be administrative of the law, yet violates its vital principles and rules.

"10. If we establish that what Mexico is praying for, is illegal and inequitable, honor can not grant what law and equity refuse.

(*a*) 1 Pet., 193.
(*b*) 2 C. C., 224–227.
(*c*) 13 Opin., 23, 24.
(*d*) 17 How., 612.
(*e*) 8 Johns., 245.

"11. No Chancellor, if there were Chancery Jurisdiction of such matters as those here involved, could abstain from severe condemnation of the spirit, manifested by the proposition of Mexico to exclude rebutting evidence. *A fortiori* is that spirit here condemnable, where it reveals the character of the several attempts which Mexico has made, not only to defeat, but to make odious Weil's claim.

"12. Secretary Fish was fully right in holding that the honor and the duty of this country utterly forbade the *entertainment* of any attempt, whether regular or irregular, direct, or indirect, on the part of Mexico, to try to bring about retrial of the award in favor of Weil and that in the La Abra case.

"13. The action of Mr. Fish, in that behalf, ought to be regarded as *res judicata*.

"14. In view of the pecuniary transaction which immediately followed that decision of Mr. Fish, a principle almost identical with that which is applied to allegations of *accord and satisfaction* may well be appealed to here.

"15. But the great principle which we are most disposed, as well as most interested to insist on, is the principle applicable to the solemn pledges, interchanged between Mexico and the United States for the absolute finality of the awards in question.

"Reference was also made to the printed arguments, presented by the undersigned to the House Committee for Foreign Affairs; and to these arguments, (of which copies will be herewith offered,) we refer, as connected with the present argument.

"In view of all that is thus variously offered to the notice of the present Secretary, we respectfully and earnestly insist, that President Hayes might well have closed the whole affair before him, without sending it, in any shape, back to Congress.

"Congress, however, chose to give him no new power; and, *exhausting the power that he actually had*, he decided

that, for the reasons indicated by Secretary Evarts, no new treaty ought to be made, that no retrial ought to be had, and that the four suspended installments ought to be paid; and *this was actually done by his direction.*

"Secretary Blaine paid the fifth installment, in accordance with the decision made by President Hayes.

"Now, could there be a case of *res judicata* more complete than that we here present?

"We speak as well of the question as to the making of a new treaty, as of any other question. Both the President and the Secretary of State, years ago, and after much consideration and a long delay, decided that there ought to be no treaty for the purpose of opening up the awards in question."

I respectfully submit that these positions were well taken, and that they ought to have had the effect of preventing the Secretary from advising the President to seek ratification of the Treaty that attempts to nullify the suspended Awards.

II. But Mr. Solicitor General now comes and says, or seems to say, that it is not *shown* that President Hayes *did* decide as, in my just quoted language, I aver that he did. The learned counsel of the Government makes an ingenious effort to make out, that the contingency contemplated in the Act of 1878, was such, that no part of the Act provided for distribution, in the case of such proceedings as were actually carried on and out, under the supposed authority of the Act, by President Hayes. We are told "that the provision for distribution contained in the first section does not apply to Weil, except either in case the President, after an *investigation*, as authorized in the fifth section, has decided that the award shall not be *reopened and retried*, or in case, after a decision that there should be a retrial, an affirmation of the award has followed." Thereupon, Mr. Solicitor proceeds to say that, "inasmuch as, in the event, there has been no retrial, the petitioner must make out by the record that the President, after

investigation, has decided that the original award in favor of Weil should not be reopened and retried."

Here is ingenuity; but is there more?

What *solid* question can there be, that, after suggesting to Congress to take such action as it might see fit to take, under the rather cloudy intimations of Mr. Evarts to the President, as far as the *honor* of the country was concerned, and as to undefined possibilities of some sort of Presidential action, in respect to the suspended awards, the President, *having already decided that there ought to be no disturbance of the Awards, by Treaty or otherwise*, determined, after Congress had failed to take *any* action on the subject, that the distribution must no longer be delayed? If I am right in this respect, did *not* the President, after investigation, decide "that the original award in favor of Weil should not be reopened and retried?"

As far as *distribution* is concerned, the objection to the act of 1878, is its unconstitutional provision for the holding up of distribution till the happening of the improper contingencies, contemplated in that provision. But it is not now necessary to set forth the reasoning which I have more than once advanced to show, that it was not for Congress to empower either the President or any other person to carry on the investigation contemplated by the fifth section of the Act, and meantime to withhold payment of the suspended awards. The President approved that section, as well as the sections in association with it, and he finally arrived at the decisions I have spoken of. Shall we be ingeniously argued out of the substantial benefit of those decisions?

III. Mr. Solicitor, however, coming to the close of his decidedly ingenious Brief, advances these expressions:

"Upon the whole matter it is submitted that the Secretary can not be coerced by a writ of mandamus—

"1. Because the petitioner has no title to the money that can be recognized by a court.

"2. At all events, because, under the circumstances,

the duty of the Secretary, in passing upon the right, is executive and not ministerial.

"3. As a distinct objection, that *in respect of comity alone,* Courts will not interfere with the *statu quo* upon which pending legislation, having a specific reference to that status, is intended to operate."

I most respectfully contend, that neither of the grounds, so taken by Mr. Solicitor, has any strength at all against the claim of the Relator for relief.

IV. That "the Petitioner has no title to the money that can be recognized by a Court," appears to me, I must allow myself to say, not disrespectfully or inappreciatively, far more ingenious, far more fanciful, than solid; and I submit that nothing in the power of argumentation could suffice to make that proposition stand on lasting legs.

Endeavoring to justify it, however, Mr. Solicitor advances this contention:

"Inasmuch as the convention of 1868 imposed no duty upon the Secretary of State in respect to the awards which it authorized, and indeed was a transaction to which only the United States and Mexico were parties, it seems that no reliance can be placed on that as *directly* warranting this proceeding. Some other action by the United States was requisite before the results of the convention could create, as between them and private persons, such rights as might be enforced in courts.

* * * * * * * *

"The act of 1878 is necessary to the relief prayed, and . . . the rights of the petitioner before a court are such only as are thereby given, and consequently must be asserted subject to whatever conditions that statute imposes. But for that, the rights of the petitioner to recover from the United States any part of the aggregate sum which they may have received from Mexico upon this account, would be only a political right."

I have heard, with lively and admiring interest, an able and quite learned argument, that discriminated be-

tween a *justiciable* right and a *non-justiciable* right. One learns from Legal Lexicons, that there was "in old English Law," the term *justiceable*, denoting "amenable, summonable;" and the word *justiciable* (which is to be found in dictionaries,) may be a completely unexceptionable new issue of the ever active word-mint of our always augmenting idiom. I take the meaning of this new coinage to be applicable (to use language already quoted from the Brief of Mr. Solicitor,) to "such rights as may be enforced in Courts." It means the *Jural Interests*, if I may use that phrase, which can be so asserted as to draw out an exercise of the great power, known as Jurisdiction, which this Court has defined to be, "the power to hear and determine a cause." For, I am more than ready to *admit*—I feel myself, throughout my little part in this discussion, *actively concerned to contend*—that, not in the Judicial Courts alone, but in the Senate, in some cases, involving the exercise of the Treaty-Ratifying Power, and, indeed, wherever there may be a question as to power over claims of Jural Interests—one must discriminate with care between the *legally cognizable claims of right* and the *non-legally* cognizable jural claims.

Of this, however, I shall have occasion to say more anon.

The able and distinguished gentleman, to whose Brief I am responding, points to no judicial utterance, to warrant his position, touching the want of judicially cognizable title in the Relator and his Assignor. I grant, however, that the learned gentleman's *own* authority is high, and I respect it as I ought. But I can not convince myself that there is more than shadowy matter in the proposition he advances, touching title.

On the other hand, no thoughtful and instructed person will deny, that we are here in presence of a question, which, like other questions in this case, exalts the case itself to a high place among occasions for judicial declaration of juridic principles. While I conceive that the Tri-

bunal I address can have no *difficulty* in determining the evidence of Law which its deliverance, in this respect, ought to afford, I deem the *opportunity* afforded to put forth that evidence, an opportunity of high concern to Bench and Bar alike.

According to my own conception, the high Treaty-Making Power of our Government was not exerted, in the instance under view, *to confiscate*, but *to sustain* and *to secure*. It was, I think, exerted to sustain and to secure the Jural Interests of Individuals, whether American or Mexican, who claimed indemnity for wrongs, or who asserted credits, which the ordinary course of Juridical Proceedings could not bring into Adjudication and enforcement. Whether it is competent, or not competent, for a Government, in exercising its Treaty-Making Power, so to act on Jural Interests of Private Persons as to convert into its *own* those articles of Property, there may be no occasion, now, to thoroughly discuss. But is it not entirely certain that, *on principle*, no Government can so appropriate the Jural Interests of Individuals without becoming, *ipso facto*, debtor to those Individuals because, and to the full extent, of the appropriation?

Let me beg the Court to mark, that I do not concede the competency of this nation's Treaty-Making Power to appropriate, as just, for the mere sake of argument, supposed. According to my *own* conception, what is known in Jurisprudence as the Law of Nations (*a*) so applies to the ideal Persons we call States, as to completely interdict to them all *such* appropriation of the Property of Natural Persons. But is it not quite enough to say, at present, that in the purposes of our Treaty-Making power, as well as in the purposes of the Mexican Treaty-Making Power, in concluding the Convention under notice here, was nothing in the least like an appropriation of the Jural Inter-

(a) Recognized in *Fletcher* v. *Peck*, 6 Cranch, 87, as well as in *The Antelope*, 10 Wheaton, 66, and in *Calder* v. *Bull*, 3 Dallas, 386.

ests, which the Convention ordered to be treated in the way of Arbitration and Award?

On looking, as I think the Court's Judicial Notice may, into the course of procedure, and above all into the form of Adjudication, under the authority of that Convention, no research can fail to find, that those Adjudications were designed, not *to appropriate* to either of the Treaty-Making Governments, but *to find out, and to assign to Private Persons, claiming Jural Interests, what was their due.*

Would it not be at once a grievous and a foolish "sticking in the bark" of this high Business, to hold that the Adjudications of which the "Weil Award" was one, gave Jural Interests *to the United States and Mexico, respectively*, and left to Persons whom those Jural Interests had formerly belonged to, nothing but the right to petition the appropriating Governments, respectively, for such relief as Congress might see fit to give?

I can not apprehend that this Tribunal will so "stick in the bark," and thus deliver a most heavy blow at some of the most valuable aspects of Adjudication in the form of International Awards. The cause of such Adjudication daily more and more requires, not hindrance, and not crippling, but the very best advancement it can have.

V. I now come to the proposition of Mr. Solicitor, that "the Secretary can not be coerced by a writ of mandamus," "at all events, because, under the circumstances, the duty of the Secretary, in passing upon the right, is executive, and not ministerial."

I grant that "the circumstances," thus referred to, are exceptional. I am quite ready to acknowledge that they are, indeed, amazingly and even quite astoundingly abnormal. Willingly would I, if possible, invoking this august Tribunal to apply its utmost power of Judicial Notice, have that Notice comprehend the whole of the ineffably repugnant history of the contrivances Diplomacy has not disdained to use, to nullify a most important Jural Interest, established by an International Award. I shall

not "travel out of the record," in the least; I know, and I shall faithfully perform, my duty as to that, as well as in regard to all other points of advocatal obligation in this unspeakably important case; but I invoke the Court to use the utmost stretch of its authority to take Judicial Notice of the "circumstances" which have entered into the long and curious history of the just-mentioned diplomatic works and ways.

As pointed out in my Preliminary Statement, there is, appended to Mr. Solicitor's Brief, an Appendix, not a word of which, although it does by no means even intimate the whole of the contrivances of Mexican-American Diplomacy to nullify the Jural Interests for the inviolability and perpetuity of which I here contend, would I, if I had power, take from the consideration of the Court. But, as already intimated, if I could I would exhibit to the Court a perfectly minute account of *all* the matters, but *a few* of which are shown in that Appendix.

I submit that if the Court *can* take Judicial Notice, it ought not to fail to take that notice of this passage in that history, as shown by the Record of the Arbitrating Action in the case of Weil:

On the 2d of April, 1875, Commissioner Wadsworth delivered the following opinion:

"In the face of so many witnesses of respectability I am unwilling to decide that the facts detailed by them are not true.

"I must decide on the proofs and documents filed in the case, and nothing else.

"These remain without contradiction by the Government, and, *to remove all misapprehension, I state that I am willing to give every opportunity in my power as a Commissioner to the Government to make a full and ample investigation of the claim, and respond to it, and very much wish that this might be done.*

"But, *as this is declined*, I must act on the proofs before me. It is now my decision that the United States must

have an award for the value of the property, at the time and place of its seizure, with interest."

A long opinion is delivered by Commissioner Zamacoma. In the course of it he thus admits and endeavors to account for the declension so referred to by his colleague:

"The claimant has further alleged, laying much stress upon the evidence submitted by him, and giving great weight to the want of defensive testimony on the part of Mexico. In this there is a statement which is far from being true. Mexico has forwarded her evidence, although with the delay consequent upon obtaining proof in a matter of this nature. The said evidence was submitted to the Commission, and under the rule which has been put in practice for some time past, and which is now in force, the agent of Mexico met with difficulties; but in the brief which he submitted at the time of offering the evidence he gives it to be understood that there is much evidence, both documentary and of testimony, contradictory of the occurrence on which the claim is founded.

"The United States Commissioner, without disregarding the more than suspicious aspect of the case, proposed to the undersigned, at the moment of the session at which the case was about to be disposed of, to admit the evidence offered in behalf of Mexico, and at the same time allow the claimant an opportunity to rebut it by new evidence.

"The undersigned had several reasons for not considering the proposal desirable. In addition to that, in the present condition of the labors of the Commission, the method of deciding the cases in their numerical order having been adopted, and the declaration made that all cases should be closed, and it being desirable that in proceeding no cases should be left behind undecided. There is in the present case the still more serious consideration that there is sufficient evidence upon which to judge of the claim, and that by opening the door to new testimony

it would only serve to show the claimant wherein the edifice which he had erected upon his imagination was weak, and by enlightening him as to how to crown his witnesses by new efforts, which, although they would not change the aspect of the case, might lead to confuse it. Unfortunately it is not the practice of the Commission, nor perhaps would it be possible for us to send for the witnesses to subject them to a rigorous examination.

" If this could be so, then the admitting of further testimony would not present so many objections, but to advise the claimant, by informing him of the impression created on the mind of the Commission, by the papers presented by him, authorize him to obtain further evidence, and even give him time to manufacture documents, all of which is, unfortunately, easy at the places in question, (See the testimony of Colonel Haynes, submitted by the United States in case No. 733 of P. I. de la Gaza,) and this when the labors of the Commission are about expiring, without a possibility of any further investgation, would be a proceeding in which all the advantages would be on the claimant's side, and would furnish greater probabilities of making intrigue and fraud successful, than truth and justice."

How, after that exposure of ideas, and that failure to make use of " day in Court," even Diplomacy could bring about what surely *has* been brought about, against the Jural Interests of Weil, perhaps no history, however full, could fully show.

Suppose the Court should deem itself not capable of noticing, judicially, the matter that I have just spoken of; I have at least the right to argue that it is but reasonable to suppose that there may be, in the Arbitratal Record, just such beauties as the beauties which, if the foregoing showing may be noticed, it discloses.

If the Court can take Judicial Notice such as I so much

desire, (*a*) the following statement, made by my colleague, Judge Johnston, for the Brief addressed, as has been shown, to the Secretary of State, must certainly be deemed of lively interest and not a little practical concern:

"On the 27th day of April, 1870, Benjamin Weil filed his memorial before the American and Mexican Joint Commission, together with forty printed copies of the same, twenty of which were in English and twenty in the Spanish language, the latter intended for the information and use of the Mexican Commissioner and Agent. In his memorial, Weil stated specifically the description, quantity, and value of the property taken from him; the time when it was taken; the place where it was taken, and that it was taken by the forces of the Republic of Mexico.

"The evidence on which he relied to establish his claim was filed the last of April and on the 3d day of August, 1870. On the 8th of October, 1870, counsel for claimant filed their Brief; the case was placed on the notice docket of the Commission, and the Agent and Counsel of Mexico notified that it was prepared and ready for hearing on the part of the claimant.

"Afterwards, on the 27th of June, 1872, the claimant, by leave of the Commission, filed two additional depositions.

"The case was not disposed of by the Commission until the 2d day of April, 1875, and hence it will be seen that Mexico had nearly five years after she was notified of the precise character of the claim and the evidence relied on by the claimant to sustain it, in which to procure and present her defensive testimony. There is and can be no pretense of surprise or of want of time and opportunity to meet and answer this claim, because, as before shown, the memorial and the principal part of the evi-

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(a) See, on that subject, generally, the opinion of Mr. Justice Swayne, in the case of *Brown* v. *Piper*, 91 U. S., (4 Otto, 42.)

I earnestly request the Court to look at what may be found on pages 194 and 213 of Gresley's *Law of Evidence in Equity*. Two cases, there referred to, are of great significance. Each of them was decided *on demurrer*. In each of them, Judicial Notice, guided by mere Argument, extended to things not alleged and not admitted or implied in the bill. The second case shows a farther reaching of Judicial Notice. It reports information, got by the Judge on his own application at the Foreign Office; on the strength of which the Judge, on the principle, that a Demurrer admits only what is well pleaded, finds and decrees in downright contradiction of false allegations in the Pleading that was challenged by Demurrer.

dence were filed five years, and the two last depositions nearly three years, before the Commissioners passed upon the case.

"Mexico, knowing the proofs adduced to sustain the claim, took evidence to defeat it. This evidence was in the hands of the Agent of Mexico for a long time before the case was finally acted on, but he did not and could not be induced to file it.

* * * * * *

"The crowning reason for the course pursued by the Mexican Agent will be shown in the next paragraph of this paper.

"As the Commissioners failed to agree, the case was sent to the Umpire, Sir Edward Thornton, for decision, and the sagacious agent of Mexico, having refused to file and submit his evidence before the Commission, sought to introduce and use it before the Umpire, hoping thereby to prevent the claimant from rebutting, contradicting, or explaining it. Unfortunately for the success of this scheme, the Umpire could only examine and consider such evidence, 'for and against the claim,' as had been presented and submitted to the Commissioners.

"After a patient and careful consideration of the case on the evidence, and the arguments furnished by the Agents of the United States and Mexico, Sir Edward Thornton, on the 1st of October, 1875, made an award in favor of the claimant.

"The awards of the Commissioners, or of the Umpire, were made by the terms of the Treaty absolutely *final and conclusive*, *without appeal* to any other body or authority whatsoever. In proof of this, attention is called to the following clauses of Article II of the Treaty:

"'The President of the United States of America, and the President of the Mexican Republic, hereby solemnly and sincerely engage to consider the decision of the Commissioners conjointly, or of the Umpire, as the case may be, as absolutely final and conclusive upon each claim de-

cided upon by them or him respectively, and to give full effect to such decisions *without any objection, evasion or delay whatsoever.*

"'Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the Umpire whom they have agreed to name, or who may be determined by lot, as the case may be; and such Umpire, *after having examined the evidence adduced for and against the claim*, and after having heard, if required, one person on each side as aforesaid, and consulted with the Commissioners, shall decide thereupon *finally and without appeal.*'

"By the presentation and submission of his claim to the commission, Weil became a party to the Treaty; and had a decision been rendered against him, he would have been incontestibly concluded by it, and his claim forever barred; but the decision having been made in his favor, Mexico is in like manner concluded, and the award must stand. The legal representatives of Weil cannot, therefore, be deprived of their rights under the award, nor can the Government of Mexico be excused or relieved from the obligation imposed by it, without alleging and proving that the Commissioners, or the Umpire, acted corruptly, or with flagrant partiality in making the award. We affirm that these are the only grounds upon which an international award can be impeached or set aside.

* * * * * *

"On the 29th day of April, 1876, more than six months after this award had been made and entered on the record of the proceedings of the Commission in due form, and whilst the Umpire was busily engaged in the examination of the cases not then disposed of, Mr. Mariscal, Envoy Extraordinary and Minister Plenipotentiary of Mexico, and Mr. Fish, Secretary of State of the United States, both with full knowledge of what had been done, and each with full powers for that purpose, conferred by his Government, concluded a treaty between the United States of America and the Mexican Republic, by which

it was solemnly agreed that 'the total amount awarded *in all cases already decided*, should (shall) be paid in gold or its equivalent,' in annual installments, not exceeding three hundred thousand dollars in any one year; the first payment to be made on the 31st day of January, 1877.

"This stipulation is contained in Article II of said Treaty, and is in these words:

"'It is further agreed that so soon after the twentieth day of November, one thousand eight hundred and seventy-six, as may be practicable, the total amount awarded in all cases already decided, whether by the Commissioners or by the umpire, and which may be decided before the said twentieth day of November, in favor of citizens of the one party, shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, on or before the thirty-first day of January, one thousand eight hundred and seventy-seven, to the government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in article VI of the said convention of July, 1868. The residue of the said balance shall be paid in annual installments on the thirty-first day of January in each year, to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year, until the whole shall have been paid.'

"This treaty was ratified by both Governments, and proclaimed and published by the President of the United States, on the 29th day of June, 1876.

"Later, in answer to a note of Mr. Mariscal, then Minister from Mexico, Secretary Fish said, on the 4th of December, 1876:

"'By article second of the Convention the two Governments bind themselves to consider the decisions of the Commissioners and of the Umpire as absolutely final and

conclusive, and to give full effect to such decisions without any objection, evasion or delay whatsoever; and by the 5th article the High Contracting Parties agree to consider the result of the proceedings of the Commission as a full, perfect, and final settlement of every claim upon either Government arising from transactions prior to the exchange of ratifications thereof.

"'It may be quite proper that Mr. Avila should advise you of his views as to any particular awards, or as to any points connected with the closing labors of the Commission, and you may have felt it to be your duty to bring to the notice of this Government those views so communicated to you.

"'I must decline, however, to entertain the consideration of any question which may contemplate any violation of, or departure from, the provisions of the Convention as to the final and binding nature of the awards, or to pass upon, or, by, silence, to be considered as acquiescing in, any attempt to determine the effect of any particular award.

"'With your appreciation of the objects in contemplation in this method of settlement of differences between two Governments, and with your intimate acquaintance with the particular provisions of this Convention with reference to the binding character of the awards made by the Commissioners or by the Umpire, you will readily appreciate my extreme unwillingness to consider that, at the moment when the proceedings relating to the Commission have been brought to a close, and the obligation upon each Government to consider the result in each case as absolutely final and conclusive becomes perfect, the Government of Mexico has taken, or proposes to take, any steps which would impair this obligation.'

"On the 8th of the same month the Mexican Minister replied, saying, among other things:

"'It is not my intention, nor the intention of Sr. Avila, to open any question whatever, nor to put in doubt the

final and conclusive character of the above-mentioned awards.'

"But the deliberate and solemn approval and confirmation of what had been already done 'by the Commissioners or the Umpire,' by the terms of the last-named Treaty, and the affirmative decision of Mr. Fish and the disclaimer of Mr. Mariscal, were supplemented and completed by the action had by and between Mr. Mariscal and Mr. Fish, acting for and in behalf of their respective Governments, under Article VI of the original Treaty of July 4, 1868, in the adjustment and settlement of the expenses of the Commission.

"The labors of the Commission terminated on the 20th of November, 1876, and on the 14th December following Mr. Fish and Mr. Mariscal made and signed the settlement referred to; it is entitled a 'Statement of account of United States and Mexican Claims Commission,' and will be found in House Mis. Doc. No. 39, 2d session, 44th Congress.

"In this account Mr. Mariscal charged the United States the agreed percentage on *all* the awards made in favor of its citizens, and for the two awards now objected to, namely, those of Weil and La Abra Silver Mining Co., he charged and was allowed to include in the expense account of the Commission, over forty-six thousand dollars, and by this recognition and confirmation of what had been done in these two cases, Mr. Mariscal was enabled to retain and pocket for his Government thousands of dollars, the right to which was based solely on the validity and binding character of the two awards in question.

"It is submitted:

"1st. That the award in favor of Weil was, by the terms of the treaty of July 4, 1868, absolutely final and conclusive, and could not have been set aside without alleging and proving that the Commission, or Umpire making it, acted corruptly or with flagrant partiality.

"2d. That this award and '*all cases already decided*,'

were solemnly approved and confirmed by the Treaty, before referred to, concluded on the 29th of April, 1876.

"3d. That this award was again recognized and confirmed by the settlement of the expense account, on the 14th day of December, 1876.

"4th. The defendant, Mexico, refused during the lifetime of Benjamin Weil to place her defensive evidence on file, for it could then have been fully met and refuted; but now that Weil is dead, that Government and its representatives are attempting to blacken his name, rob his widow and children, break the faith of two treaties, and a final settlement under them.

"If this case has not been fully and fairly settled, there is and can be no such thing as a final determination, settlement, and payment of a claim against the Government of Mexico.

"These questions were carefully presented and argued in our Brief before the House Committee on Foreign Affairs, and to it, and the able and exhaustive Report of the Committee, attention is respectfully solicited."

If the just-quoted statement, and my own statement, drawing the attention of the Court to matters that appear of Record, shall appear to the Court beyond the proper compass of Judicial Notice, still no harm is done. If the statements referred to can receive no notice from the Court, however, like remark is applicable to all that is presented in the Appendix to Mr. Solicitor's Brief, except the copy of the Act of 1878. The statements just presented are offered *bona fide;* they are advanced to direct Judicial Notice, if it can be reached by them; and I respectfully submit to the Court, without more remark, their fortune or their fate.

But now let us resort to the rather curious information and suggestions, offered in the Answer of the Secretary of State to the Petition for Mandamus, in the Court below.

I first invite attention to page 11 of the Printed Re-

cord, as contained in the Transcript. Here one finds the words:

"Your respondent, while respectfully insisting that the claimants referred to in the said act have no right that the Judiciary can enforce so as to contravene the political and constitutional action of the Executive Departments, further submits that in any event the Claimants acquired a right no more vested than that of one in whose favor a judgment of a competent Court has been rendered, and that the right of the Claimant, in the one case as well as in the other [may] be questioned by competent authority, and, if found to have been obtained by fraudulent practice upon the Court or upon the Commission, can be declared void; and submits that the measure inaugurated by the President, and now pending before the Senate, is the proper mode of adjudicating the question whether the claim of the said Benjamin Weil was allowed through fraudulent practices."

Farther on, the Answer says:

"That on the 8th August, 1879, the Secretary of State decided that there was grave doubt of the substantial integrity of the claim of Benjamin Weil, and that the honor of the United States required a further investigation of the claim."

The Answer also uses these expressions:

"Mr. Evarts, in a revision of his opinion on the September of the last year aforesaid, said that the treaty under the provisions of which the Commission which made the award in the Weil case was a finality, and says:

"'The principle of the settlement of international differences by arbitral commissions is of such deep and wide-reaching interest to civilization, and the value of such arbitration depends so essentially upon the certainty and finality of its decision, that no government should lightly weaken its influence, or diminish its consideration, by making its action the subject of renewed discussion.'

"Your respondent, on the contrary, however, respect-

fully insists that no award is valid and final, if obtained by fraudulent means, and that to hold it valid would destroy the value of international arbitration.

" And your respondent also insists that the proper mode of obtaining a retrial is by invoking the Treaty-Making power of the two Republics."

In the same remarkable document is said :

" And this respondent further respectfully shows to your Honors that evidence of the fraud underlying the Weil award has been discovered, and is of much importance on this question.

" In May, 1881, President Hayes' decision having been made in September, 1879, it became known that additional and important evidence in relation to the claim existed in the Treasury Department, tending to establish the conspiracy to defraud Mexico, and impose upon the good faith of the United States. Copies of those documents were furnished by the Secretary of the Treasury on the 3d of December, 1881. In sending them, the Secretary stated that a portion of the documents had been sent to the Department of State in November and December, 1877. An examination shows that a part, and only a part of the documents had been received as stated, but had not been brought to the attention of Mr. Evarts.

" This newly discovered evidence appears to have been unknown to President Hayes and Mr. Evarts, the Secretary of State, when the decision of 1879 was made."

Now, *does* Mr. Solicitor, or *would* Mr. Solicitor, pretend that there has ever been in any quarter, even *allegation*,—even so much as a *faint intimation*—that, in the sense of the exposition made in the *Throckmorton case* (*a*) there was a practicing of fraud in the *obtaining* of the Weil Award? However, if one turns, now, to the language of the Answer, where it speaks of alleged " evidence of the fraud *underlying* the Weil Award," one can not doubt that

(a) *Supra.*

what the Secretary, after all, intends to allege, or half-allege, is the very sort of fraud that the Throckmorton case decides to be entirely insufficient to disturb Adjudications generally.

Advocatal privilege must not be strained in what I feel obliged to farther say about the paper under view. I must not yield to the temptation to indulge in a free criticism of that at once juridical and diplomatic document. It must not here be handled roughly, in the least. In criticising it, I must quite carefully observe the rules of advocatal decency and delicacy, and I must remember, all the time, the high respect which the august Tribunal I am here addressing always pays, and ever ought to pay, to other Branches of the Government. But, on the other hand, I must, it seems to me, regard myself as free to say, that the diplomatico-juridic document before us, is, to say the very least, a highly curious contribution to American Diplomacy. I seem to myself to be respecting all that ought to be respected, in subjoining to the criticism just submitted, that *Diplomacy in general* appears to me a quite stupendous curiosity, in several respects, especially when one considers it in view of theories, respecting "the survival of the fittest." How Diplomacy, with its peculiar Ethics and its very feeble notion of the Jural Order of these times, remains an extant thing, at all, some curious researcher might well try to somehow ascertain. At present, we can notice only such distinctions of Diplomacy as are quite naturally present to one's thoughts, on carefully perusing the aforesaid diplomatic document.

Diplomacy appears to need the lesson taught as follows in the course of an extremely interesting expression of Juridical Ideas:

In the case of *Le Louis* (*a*), Sir William Scott observed: "To procure an eminent good by means which are unlawful, is as little consonant to private morality as to pub-

(a) Dodson, 257.

lic justice." One may also say that such a course is as little consonant to true views of Public Justice as to Private Morality. Diplomacy, however, seems to hold, as a Religious Body was once generally, but, I have no doubt, unjustly, charged with holding, that good ends may justify bad means.

I have no reason to believe, and certainly I do not in the least believe, that either new evidence or any other sort of evidence, has *proven* the alleged fraud of Weil; nor do I even apprehend that *proof* of it would be adducable were there retrial of his case, although he is not living to defend himself, and was, before his death, an interdicted, isolated Lunatic. But I would be uncandid and discourteous alike, were I to intimate a doubt, that when the Secretary of State answered as has been shown, both he and the President, *imperfectly informed as they must have been*, believed that there was proof that Weil had committed fraud *in the adduction of testimony, known by him to be untrue.* But why should any person, so believing, answer so as to present the case as it *is* presented in the document of which I have been speaking, and, moreover, why should any person, so believing, work with Mexico to defeat the settled rules, respecting high Adjudications?

May it please the Court, a Treaty such as that now seeking Senatorial Ratification as the Secretary's Answer shows, would work infinitely more evil in the sphere of International Adjudications than would be effected, in the sphere of *Intra*national Adjudications, by reversal of the salutary ruling in the Throckmorton Case.

Diplomacy has no necessity for, and no right to, a rule other than that which is laid down in that exceedingly important case, respecting the non-diplomatical Adjudications. What, in this respect, is *juridically* right, is also *diplomatically* right, whatever the Diplomatist may fancy on the subject; and it is high time that he should be instructed on this point.

To me, it seems incredible that learned Senators, dis-

tinguished in the world of Polity and Jurisprudence, both, can, after fit consideration, fail to vote against the ratification of the singularly noxious Treaty here set up, as if by way of bar. It seems to me, their action must be such as to effect rejection of the Treaty. But, even if the Treaty *should* be ratified, what then? Could its effect on Jural Interests as fully vested as are those I here contend for and insist upon, be suffered to read *backward?* Could it be even *supposed* by any one, to reach the *installments now past due?*

My own, at least not rash opinion is, that neither *forwardly* nor *backwardly*, could such a Treaty have effect on Jural Interests now vested; and I doubt not that this Court will so decide.

VI. It is respectful to Secretary Frelinghuysen and the President to say, as, with the amplest reason, I *do* say, that it is not to be believed, and I am sure that neither of them ever will be found asserting, that, *at the time when the now pending Treaty was concluded*, either of them had *actual* knowledge of the proceedings of President Hayes and Secretary Evarts, under the act of 1878. No word in this Record even hints that, in agreeing to this Treaty, either President Arthur or Mr. Secretary Frelinghuysen had been informed, by any person, of what had been consummated under that act. It would be disrespectful to both of them to suppose that, with actual knowledge, on their part, of the hearings, considerations, and determinations, under that Act, the determinations were summarily overruled, without so much as notice to, and hearing of, the persons having vested interests under these determinations, and not charged, in any way, at any time, with having taken part in any alleged fraud. For my part, while I cannot affect to think that the negotiation and conclusion of the new Treaty are excusable in any view whatever, I have not the slightest doubt—I *could* not, in the circumstances, justify myself in doubting—that it was in perfect ignorance of the proceedings carried on by Secretary Evarts and President Hayes under the Act of 1878,

that the now pending Treaty was negotiated and concluded. What has been *communicated* to me on the subject, I have not, under the rules of Law, the liberty to say; and all I ask of the *Court* is, that the Judges shall very carefully examine the whole Record, with reference to what I have just said, and see if kind respect toward the Secretary and the President does not forbid one to believe that it was with actual knowledge of the occurrences under the Act of 1878, that they, so deplorably, negotiated and concluded the Treaty I so earnestly assail.

VII. At least while Time shall not include Eternity, and while infinity of duration shall not seem, even to a Diplomat, a proper attribute of Litigation, even in its diplomatico-juridic form, there would appear to be quite solid reason for not suffering Mr. Secretary Frelinghuysen to overrule Mr. Secretary Evarts, touching the true policy respecting the finality of International Awards. "How long, O Lord! how long" shall Litigation last, when it takes place between Sovereignties representing Individuals, and when the leading objects of the Treaty, under which the Litigation has commencement, contemplate, as well as naturally and imperitively order, summary instead of "long drawn out" arrival at an end? I most respectfully submit that Mr. Secretary Frelinghuysen very gravely erred when he declared, in his Answer, that he took issue with his predecessor, Mr. Secretary Evarts, on the subject of finality in International Awards. Diplomacy has neither right nor interest to any other rule than that laid down as to Intranational Adjudications, by the already more than once cited opinion of Mr. Justice Miller, in the Throckmorton Case. Mr. Secretary Frelinghuysen, however, is mistaken in announcing that he differs from Mr. Secretary Evarts, touching the proper indisturbableness of International Awards. As we have seen, the language used by Mr. Secretary Frelinghuysen, (*a*,) after

(*a*) See page 13 of Printed Record.

quoting Mr. Secretary Evarts, runs as follows: "Your respondent, on the contrary, however, respectfully insists that no Award is valid and final if obtained by fraudulent means, and that to hold it valid would destroy the value of International Arbitration." Let me be allowed to say, again, with all due emphasis, that *nowhere in the history of the Weil Award does it appear, in the sense of the rules laid down in the Throckmorton Case, that any person ever even* ALLEGED *that there was fraud in the 'obtaining' of the Award.*

The Court, I feel quite certain is as desirous as Mr. Secretary Frelinghuysen is, and I, myself, although I speak in advocatal fashion only, solemnly and sincerely say, that I am not less desirous than the Secretary or the Court can be, to hold up to the highest reach of dignity and worth Adjudications in the shape of International Awards. But this can not be done by disregarding in respect to them the warning given in the words of Mr. Justice Miller, in the *Throckmorton Case:* "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest rei publicæ, ut sit finis litium*, and *nemo debet bis vexari pro una et eadȩ causa.*"

VIII. But Mr. Solicitor maintains that here is a question of *comity* and of like things. Assuredly, this argument demands not of our Highest Court of Justice any disregard of what belongs either to the President or to the Senate. The Relator would have reason to be very much displeased with me, indeed, if, representing him, I should here say one word against the giving, willingly as well as fully, to the Senate and the President alike, of what is due to them, according to the Constitution and the Laws. I would not less misrepresent *myself* if I should say a word, in any form, with any object, lacking in respect for either President or Senate, forming the grand Treaty-Making Power of the Land. But, on the other hand, I would do

wrong to the Relator and myself alike, and to the calls of the occasion that draws out this unpretending but completely conscientious argument, were I to say a word, according less than due respect to the majestic Jurisdiction of this Court, or failing to insist on the full exercise by it of just the power, contemplated in the prayer of the Petition for Mandamus, in the Court below.

As to the alleged "pendency of Legislation," I shall not much agitate myself. A pending thing that has no right to pend ought not to worry either Advocate or Judge, on the score of Comity, in the circumstances of a case like this. In Heaven's name, when shall the reign of pending things, with no trace or even show of Right on which to hang, come to an end, respecting the completely and long-ago established Jural Interests I here maintain?

Although not much of the extravagantly lauded utterances of Chief Justice Marshall in the famous case of *Marbury* v. *Madison* was *jurisdictionally* said; although some parts of the *dicta* in that case were animated by improper feeling toward the Chief Magistrate; the case is well resorted to by searchers of sound evidence of Law as to the questions now distinguished as *political*, and contradistinguished from the questions which are deemed *juridical*. To what is said by Chief Justice Marshall, tending to establish fit respect for the discretionary action of the President, assuredly this argument suggests no exception.

Nor do I except, in any measure, to the doctrine of *Stanton* v. *Georgia*, (*a*) to that of *Mississippi* v. *Johnson*, (*b*) or to that advanced by Chief Justice Chase in *Texas* v. *White*, (*c*) as far as they appreciate the Presidential Power and Discretion.

I expect, ere long, indeed, to be before this Court to advocate the overruling of some cases which, I can not doubt, have failed to make as much as the Constitution orders all of us to make, of the great Power and Discretion given, not unwisely, to the President.

(*a*) 6 Wallace, 71. (*b*) 4 Wallace, 500. (*c*) 7 Wallace, 700.

But, notwithstanding the completeness of the recognition I am here attempting to express, of Presidential Authority, in all its forms, I must decidedly deny that the ingenious argument of Mr. Solicitor establishes that, on account of what belongs to the Executive Department of the Government, this Court has not the Jurisdiction which the Petition for Mandamus in the Court below assumed that Court to have.

At this point, I rely particularly on the case of *Kendall* v. *The United States*, (*a*) and on the whole effect of the *obiter dicta* of Chief Justice Marshall in *Marbury* v. *Madison*. But I do not consider that more than simple submission of this part of the case to the Court, especially in view of the suggestions made in the Brief of my Colleague, Mr. Goode, (*b*) can be within the compass of my advocatal obligations in this case.

And now I hasten to conclude this Argument, imperfect as it surely is, and far from satisfactory as it must ever be to the Arguer. I beg leave to declare that not the *difficulty*, but the imposing magnitude, the numerousness, and the almost universal interest, of the questions, which the singular resistance to the clearly just demand of the Relator, has presented in the Record or in Argument, have, added to the sense I have of the grand opportunity afforded to the Court itself by the occasion, led me to exert myself so much, to do my advocatal duty thoroughly. That it is *not* done with a vigor stalwarter, and that its whole effect must fall so far below my wishes, I can but regret. No person can do better than his best. I beg the Court to give me credit for at least an energetic and a conscientious effort to discharge my advocatal duty.

R. B. WARDEN,
of Counsel for Relator.

WASHINGTON, D. C., November 6, 1883.

(*a*) 12 Peters, 254. (*b*) Page 19.

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SUPREME COURT U.S.
FILED
NOV 12 1863
JAMES H. McKENNEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES.

FREDERICK T. FRELINGHUYSEN,
SECRETARY OF STATE,

vs.

U. S. EX. REL. JOHN J. KEY

MANDAMUS.

BRIEF OF—

P. PHILLIPS,
W. HALLETT PHILLIPS,
For Relator.

R. O. Polkinhorn, Printer.

IN THE

SUPREME COURT OF THE UNITED STATES.

FREDERICK T. FRELINGHUYSEN, *Secretary of State*
vs.
UNITED STATES, EX. REL. J. J. KEY. } No. 891.

Brief of P. Phillips and W. Hallett Phillips for Relator.

Prior to the year 1868—one Benjamin Weil had a claim against the Mexican Government for damage done to his property.

On the 4th July, 1868, a treaty was made with the Republic of Mexico, by which a commission was appointed to adjust all claims that have arisen subsequent to the treaty of 2 February, 1848.

The two governments "solemnly and sincerely engage to consider their decisions as *absolutely, final and conclusive.*"

And they agree "to consider the result of their proceedings, as a full, perfect and final settlement, of every claim upon either government, arising out of any transactions, of a date prior to the ratification of the present convention; and further engage, that every such claim whether or not, the same may have been presented to the notice of, made, preferred or laid before the commission, shall, from and after the conclusion of the proceedings of said commission, be considered and treated as *finally settled, barred and thenceforth inadmissible.*"

Under these stipulations Weil had no option. His right to demand payment from Mexico was, by the action of his own government, transferred to the commission. If he refused to appear before it, his claim was *forever barred.* But the treaty held out to him the agreement, that if he submitted to its adjudication, and his claim should be allowed, then both governments pledged themselves that the award in his favor should be *final and conclusive.*

Weil filed his claim on the 27 April, 1870, and in 1875 the cause came on for a hearing, when the agent of the Mexican Government declined to submit the evidence he had taken to show fraud in the claim.

The American Commissioner, on the submission of the cause, thus decided—

> "I must decide on the proofs and documents filed in the case, and on nothing else.
>
> "These remain without contradiction by the government, and to remove all misapprehensions I state that I am willing to give every opportunity in my power, as commissioner to the government, to make a full and ample investigation of this claim, and respond to it, and very much wish that this might be done. But as this is declined, I must act on the proofs before me."

The two commissioners having disagreed as to the judgment to be rendered, the matter was referred to Sir Edward Thornton, the umpire, who, on 1 October, 1875, made an award in favor of Weil for $487,810.68.

It is thus apparent that if this litigation had been in the ordinary judicial tribunals, with a judgment or decree in favor of Weil, the complainant could have had no relief by way of a new trial, for he was not prevented from availing himself of his defense by fraud or accident, unmixed with his negligence.

Sample vs. *Barnes*, 14 How., 75;
Hendrickson vs. *Hinckley*, 17 How., 445.

> "It is to be noted that, in the complaint of the Mexican Government, there is not the slightest impeachment, express or implied, of the character or composition of the commission of its methods of procedure, or of the entire regularity and integrity of its actual proceedings." So says the Secretary of State.

Five instalments have been paid to the claimant or his assigns, and the present proceeding by mandamus is to compel the Secretary of State to pay the 6th instalment, now in his custody.

The Relator, Key, claims, as assignee of Weil, under an agreement, 5 November, 1875, with Lambert B. Cain, attorney in fact of Alice Weil, widow of Benjamin Weil, in her own right, and as ~~executrix~~ curatrix of the estate of her husband, then declared insane, and tutrix of their infant son, John, of one-fourth of said award.

After the assignment aforesaid, Benjamin Weil died, and Alice Weil, his wife, was appointed successor to his estate, and tutrix of their infant son, John, by a court of competent jurisdiction in the State of Louisiana. She appointed Cain as her attorney, who executed a second assignment to petitioner, and another during the year 1880, re-affirming the assignment of 5 November, 1875.

These assignments have been heretofore recognized as valid by the State Department, and petitioner's receipts accepted for his proportion of the five instalments paid on said award.

He now claims the amount of $7,595.39 of the 6th instalment as illegally withheld by the Hon. Frederick T. Frelinghuysen, and prays for the writ of mandamus compelling him to pay the same.

An alternative writ was issued, and an answer filed by

respondent, to which there was a demurrer. The demurrer was sustained by the Supreme Court in General Term, and the peremptory writ of mandamus was issued for the sum claimed by the relator.

The writ of error now brings up this judgment for review.

As no question is made as to the validity of the assignment to the relator, we shall treat the case as if the petition had been filed by the representatives of Weil.

On behalf of respondent it is insisted that the judgment réndered for Weil "creates no private right that is not subject to the political action of the government."

Our governmental powers are either legislative, judicial or executive, and when the supremacy of the political power over these judgments is asserted, we take it for granted that the power of the executive is referred to.

What, then, is the character of Weil's right?

We say that, before adjudication by the commission, his claim against Mexico constituted property capable of transfer or assignment. This, after full discussion, was decided in *Vasse* vs. *Comegys*.

The same matter was considered in *Erwin* vs. *U. S.*, where it is said:

> "Whether a party has been deprived of his goods by the government rightfully or wrongfully, does not affect the character of the claim as property, though it may effect its validity and value.
>
> "Claims for compensation for the possession, use or appropriation of tangible property constitute personal estate equally with the property out of which they grow, although the validity of such claims may be denied, and their value may depend on the uncertainty of litigation, or the doubtful result of an appeal to the legislature." 97 U. S., 392;
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> See also *Phelps* vs. *McDonald*, 99 U. S., 298.

Here the claim has been merged in the judgment of a tribunal organized by the government debtor, and this is a final judgment, solemnly so declared in the organic act.

The judgment constitutes property in the fullest sense, entitling Weil to the protection and guarantees of the Constitution, though he had no means of enforcing it had Mexico failed to provide for its payment.

The respondent admits he has received from Mexico the means for paying this judgment, and the question is whether any exercise of the executive power over the Secretary shields him from the process of mandamus.

In other words, is the duty required of him ministerial merely?

What that duty is has been prescribed by act of Congress. But if no act directing payment by him had been passed, we should be able to maintain, on principle and the practice of the government, that mandamus would lie to compel payment.

The treaty is a law unto itself, and when, under its provisions, the secretary receives the means for paying the awards made under it, there arises an implied agreement that he will pay them, and this payment is a ministerial duty.

When Secretary Evarts applied to Congress for the passage of the act on the construction of which this controversy depends, he said:

> "I have *hesitated* to make distribution of the money on hand, which would be *according to the practice of the government*, because of some legislation being necessary to make good to the fund, the amount with which the Government of the United States is chargeable, and because it is desirable, that the manner of the reservation of the expenses of the government should be settled."
>
> H. Rep. No. 27, 45 Cong., 2 Sess.

It is thus seen but for these difficulties the department would not have called for any Congressional action.

We have now to deal with the act of the 4 July, 1868, regulating the duty of the Secretary, in reference to these awards.

By the first section, he is required to receive the moneys paid by the Mexican Republic under the stipulations of the treaty and distribute the sum in ratable proportions to those in whose favor awards have been made, or to their legal representatives and assigns.

It is not denied that this confers a ministerial duty on the secretary enforceable by mandamus.

The controversy arises upon the provisions of the 5th section which requests the President of the United States "to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver mining Company, or either of them should be opened and the cases reheared, it shall be lawful for him to withhold payment of said awards or either of them *until such case or cases shall be retried and decided in such a manner as the Governments of the United States and Mexico may agree* or until Congress shall otherwise direct, &c., &c. Provided, that nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims or either of them."

Note, that the duty imposed upon the Secretary to pay the awards under the first section is restrained only in the event that a new international tribunal should be agreed on between the two governments.

This was to be had if, in the opinion of the President, af-

ter he had investigated the matter, he considered the honor, &c., of the United States demanded it.

What President is here referred to? Surely the President in office when the act was passed. And if it should appear that the President then in office has investigated the charge of fraud, and has declared his opinion that the honor of the United States did not require or permit a new investigation by another international tribunal, then the payment of these awards was not to be withheld, and it became the duty of the Secretary to pay the same as directed by the first section of the act.

If the then President, had failed to act, there would be ground for the argument that his successor might have dealt with the question. But if he has acted the power is exhausted and cannot be overruled by his successor.

What an unseemly spectacle would be presented if our archives should show that President Hayes had decided that the honor of the United States did not permit a new trial and his successor has decided that it did.

The sole enquiry is, then, did Mr. Hayes, President, investigate the charges made by the Mexican Government in reference to these awards; and what opinion did he arrive at?

The answer to this controlling question is to be found in the communication made by the President to Congress 13 April, 1880, appended to the Solicitor General's brief.

This communication consists of a letter of Secretary Evarts to the President, in which he states that after a full investigation of these awards, and hearing of counsel on behalf of the Mexican Government, he had, on the 8 August last, reported his conclusions as to the proper disposition of the matter by the *executive government*, as follows:

"*First.* I am of opinion that, as between the United States and Mexico, the latter government has no right to complain of the conduct of these claims before the tribunal of commissioners and umpire provided by the convention, or of the judgments given thereupon, so far as the integrity of the tribunal is concerned, the regularity of the proceedings, the full opportunity in time, and after notice to meet the case of the respective claimants, and the free and deliberate choice exercised by Mexico as to the methods, the measure, and the means of the defense against the same.

"I conclude, therefore, that neither the principles of public law, nor considerations of justice or equity, *require* or *permit*, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico."

This was in precise accord with the prior action of Secretary Fish, who, on 4 December, 1876, in reply to Mr. Mariscal's objections to these awards, declared that he must "decline to entertain the consideration of any question which may contemplate any violation of, or departure from the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence, to be considered as acquiescing in any attempt to determine the effect of any particular award."

We have, then, an explicit decision of the only matter submitted by the 5th section for the President's determination.

When made the Secretary was bound to pay the awards as required by the first section, there being no subsequent act of Congress restraining the payment.

This would seem to be unanswerable. But reliance is had on the further statement made in the report of the Secretary that in his opinion—

"The honor of the United States does require that these two cases should be further investigated by the *United States* to ascertain whether this government has been made the means of enforcing, against a friendly power, claims of our citizens based upon or exaggerated by fraud."

This has no effect whatever upon the question to be determined.

The Solicitor General maintains it was directly responsive to the duty required by the act, one alternative in which was to request an opinion whether the honor of the United States required that the Weil award ~~and~~ should be *retried in such manner as Congress might direct.* (p. 10.)

We submit that this position finds no support in the language of the 5th section.

It authorized him to decide whether an international new trial should be had—and in this event only, it was made "lawful for him to withhold payment of these awards until they were retried or decided in such manner as the two governments might agree, *or until Congress shall otherwise direct.*"

This is a very different thing from the statement that the President was called on for an opinion as to whether the honor of the United States required that the case should be "*retried in such manner as Congress might direct.*"

A retrial by a *domestic tribunal* was not in contemplation of Congress when the act was passed. This is evident not only from the act itself, but in the subsequent action of committees of the two Houses.

The Judiciary Committee of the Senate, on 10th June, 1880, to which was referred a bill directing the Court of Claims to investigate these cases, unanimously reported adversely to its adoption.

In their report it is said:

"It proposes to withdraw these two claims from the

> dominion of international jurisdiction and place them before a tribunal, organized add existing, solely by virtue of the laws of this country, and in this way it would seem designed to avoid the opening up of other questions of complaint that are known to exist on behalf of citizens of the United States whose claims for various causes failed to receive favorable consideration by the commission under the treaty."

The Committee on Foreign Affairs, in the House, to which was referred a joint resolution, directing that payment of these awards should be withheld until further investigation be had, reported on 12th December, 1877, that "the House of Representatives had no jurisdiction over the subject-matter referred to in the joint resolution, and that the Mexican Republic has not made, and could not properly make any application to the legislative department of the Government. The committee is of opinion that Mexico is entitled to no relief at the hands of Congress."

Rep. 27, 45 Cong., 2 Sess., p. 6.

This is a clear indication of opinion of both Houses that a domestic trial was not within the purview of the act of 1868.

The Solicitor General, in opposition to this—has presented, with his brief a report from Mr. Cox made to the House on 9th June—the day before the report of the Senate Committee was made, recommending the adoption of a bill to refer these awards to the Court of Claims.

This report was, however, by order of the Committee on Foreign Affairs, withdrawn on 12 June, 1880.

Cong., Rec., 46, Cong., 2, Sess., Vol, 10; pt., 5, p. 4,486.

We are thus sustained in the proposition that a retrial in our own courts was not a question submitted to the President, and on which his opinion was asked by the 5th section

of the act. No such retrial will ever be provided for by act of Congress.

We think it has been demonstrated that the decision of the President against an international tribunal left the Secretary of State under the operation of the 1st section directing him to pay the awards.

Not only this, but when his decision was communicated to Congress, he expressly declared, that if "it now failed to act in the premises, and furnish definite instructions to the department to restrain further payment, it would be the duty of the executive to proceed in the payment of these awards."

No action has been had by Congress, and it is this duty which we now seek to enforce.

It is objected by the Solicitor General that in this matter the Secretary of State is not subject to an act of Congress, as his "duty in passing upon the right is executive and not ministerial."

This objection was taken in *Marbury* vs. *Madison* and overruled.

> "Where the heads of departments (say the court) are the political and confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more clear than that their acts are only politically examinable. But when a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual, who considers himself aggrieved, has a right to resort to the laws of his country for a remedy."

It was consequently held in this case that the President could not authorize the Secretary of State to omit the performance of those duties which are enjoined by law.

1 Cr., 137.

This is repeated in Kendall's case, in which it was held that the mandamus did not seek to direct or control the Post-master General in the discharge of his official duty, partaking in any respect of an executive character, but to enforce the performance of a ministerial duty, which neither he nor the President had any authority to deny or control.

12 Pet., 524.

There is nothing in *Decatur* vs. *Paulding*, cited by the Solicitor General in conflict with these views; on the contrary, they are again affirmed in the statement: "the case shows the difference between *executive duties* and *ministerial acts*."

Finally, the Solicitor General submits as a distinct proposition—

> "That, *in respect of comity alone*, in cases where proposed legislation has received such sanction as that (the treaty) now under consideration has done, courts will not interfere with the *statu quo* of matters directly and specifically aimed at by such legislation."

This is made his third assignment of error.

We understand the law as applicable to the *comity of nations.*

> "In the silence of any positive rule affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, that is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

When, therefore, the court below decided that a foreign corporation could not make a contract within its jurisdic-

tion, though not contrary to the known policy of the State, or injurious to its interests, its judgment was here reviewed and reversed.

Bk. Augusta vs. *Earle*, 16 Pet.

This has no application to the principle of comity here insisted upon.

The proposition, as we understand it, is this: that, however clear a petitioner's right to mandamus may be, yet if there is proposed legislation, in either branch of the legislature, which, when adopted, would affect the right to the writ—there is a legal obligation of the court to refuse it.

No authority has been cited to sustain this, and we know of no principle on which it can be sustained.

The only comity that exists in reference to the relation we are considering finds its definition in "respect or deference extended from good will, and not in obedience to authority."

Whether the pendency of the treaty was sufficient ground to induce the court to refuse the writ, was, at best, a matter of discretion to be determined by the circumstances of the case, and its judgment thereon is not reviewable here.

In passing upon the question they say:

> "This treaty was submitted during the first session of the Congress which has just expired. It has been before the Senate for two sessions of that Congress and has not yet been ratified. It cannot be considered again for a period of nine months. Delay to the citizen is often ruinous; and to withhold his remedies for one or two years is to deny him justice, and to do so out of *courtesy*, to a co-ordinate branch of the Government, is to make that an excuse for positive injustice."

We are not called on to discuss the question, whether the treaty making power can deprive the petitioner of his vested right in the judgment of the commission.

It is sufficient, for the present, to say that no such treaty exists, and in all probability will ever exist.

We make this statement broadly, for it is not reasonable to suppose that the Senate will ever agree to a new trial where the party having every means of defense declined to make it, and this after the lapse of near ten years from the rendition of the judgment, and in presence of the death of the claimant, and the probable death of witnesses.

P. PHILLIPS,
W. HALLETT PHILLIPS,
For Relator.

110—63

OFFICE SUPREME COURT U. S.
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IN THE

Supreme Court United States.

OCTOBER TERM, 1883.

FRELINGHUYSEN, SECRETARY OF STATE,

VS.

KEY, RELATOR, &c.

Brief for the Relator.

By JOHN GOODE,
Attorney.

WASHINGTON, D. C.:
PRINTED BY W. H. MOORE, 511 ELEVENTH STREET, N. W.
1883.

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FRELINGHUYSEN, *Secretary of State, &c.*,
vs.
KEY, *Relator, &c.*
No. 891.

Brief for the Relator.

It appears from the record that, on reading the petition for the writ of mandamus filed in this cause, it was ordered by the Supreme Court of the District of Columbia, that the Secretary of State show cause, in General Term, why the said writ of mandamus should not issue. That the Secretary of State, by the Solicitor General, demurred to the petition as not sufficient in law to entitle the Relator to relief, which demurrer was overruled by the Court and an alternative mandamus, in due form, was ordered to be issued by the clerk.

That the Secretary of State having made answer to the said alternative writ, the same was demurred to by the Relator, which demurrer the Court sustained, and ordered a peremptory writ of mandamus, commanding the Secretary of State to pay to the Relator, as assignee of Benjamin Weil, the sum of seven thousand five hundred and ninety-five dollars and thirty-nine cents, out of the money in his custody awarded to the said Benjamin Weil under the Convention of July 4th, 1868, between the United States and the Republic of Mexico. The question to be determined

here is, whether the Court below erred in sustaining the demurrer to the respondent's answer, and directing a peremptory writ of mandamus to be issued, as prayed for in the petition. It will be seen by reference to the petition that it presents the following facts:

1st. That on the 4th day of July, 1868, a Convention between the United States and Mexico, for the adjustment of claims of citizens of each country against the other, was concluded, and the commissioners and umpire therein provided for were duly appointed and qualified.

2d. That the claim of Benjamin Weil, a citizen of the United States, against the Government of Mexico, arising from injuries to his property by the authorities of that Republic, was presented to the Joint Commission so established under the said Convention within the time and in the manner thereby required. And thereupon such proceedings were thereafter had in the matter of said claim that the said commissioners having disagreed, Sir Edward Thornton, the umpire, who had been duly chosen and qualified, on the first day of October, 1875, made a decision on said claim and an award therein, in favor of the said Benjamin Weil and against the Republic of Mexico, for the sum of four hundred and eighty-seven thousand eight hundred and ten dollars and sixty-eight cents, ($487,810.68.)

3d. That the total amount of the awards rendered under said Convention, in favor of citizens of the United States, was greater than the total amount of those rendered thereunder in favor of citizens of Mexico, and pursuant to the provisions of said Convention, the Government of Mexico has made sundry annual payments of $300,000 each upon the balance of said awards against the Republic of Mexico remaining after deducting one of said total amounts from the other, and the money so paid has been received by the Secretary of State of the United States.

4th. That in the year 1880, the Secretary of State, by direction of the President, paid on the award in favor of Benjamin Weil and his assignees their pro rata proportion of the four instalments received by the United States from Mexico, and subsequently, in 1881, a like proportion of the 5th instalment which was paid by Mexico under the terms of the said Convention on or about the 31st of January, 1881.

5th. That the Relator received the amount due to him as assignee of a part of said award, and that his individual receipts for the five instalments were required and given, and are now on file in the Department of State.

6th. That on or about the 31st day of January, 1882, the sixth instalment of $300,000 was paid by Mexico to the Secretary of State, that the proper proportion thereof payable to Benjamin Weil, his representatives and assignees, is the sum of $34,893,68, and the amount due to the Relator, as assignee, is the sum of $7,595.39, that his assignments, the validity and legality of which have been twice recognized by the Secretary of State, are now on file in that Department, and that the said Secretary refuses to pay to the Relator the said sum of $7,595.39, although demand has been made upon him personally and in writing.

By reference to the said Convention of the 4th day of July, 1868, it will be seen that the second article binds the two Governments "solemnly and sincerely to consider the decision of the commissioners conjointly or of the umpire, as the case may be, as *absolutely final and conclusive* upon each claim decided upon by them or him, and to give full effect to such decisions without any objection, evasion or delay whatsoever," and by the 5th article of said Convention said Governments agree to consider the result of the proceedings of said Commission as full, perfect and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of

the ratifications of said Convention, and that every such claim shall, from and after the conclusion of said proceedings, be considered and treated as finally settled.

It appears that on the 29th day of April, 1876, after the rendition of said award in favor of Benjamin Weil, a Convention was concluded between the two Governments, and subsequently ratified "for extending the functions of the umpire under the Convention of July 4th, 1868," and that said Convention of April, 29th, 1876, by its second article, fully recognized and provided for the payment of the total amount awarded in all cases *already decided*, whether by the commissioners or by the umpire, as well as in cases subsequently to be decided.

It also appears that on the 14th day of December, 1876, the expenses of said Commission were adjusted pursuant to the 6th article of the Convention of July 4th, 1868, and the account thereof stated, and the balance therein as between the two Governments struck, which account and a protocol of the same date, for the purpose of said adjustment, were signed by the Secretary of State of the United States and the Minister Plenipotentiary of the Mexican Republic; that in said account the Government of the United States is charged with the percentage of said expenses upon the total amount of the awards made under said Convention against the Republic of Mexico, in which total amount *is included the amount of said award in favor of Benjamin Weil*, and that in said protocol it is stated that said Secretary of State and Minister Plenipotentiary "have caused the said account to be stated and have approved the same under their respective hands."

On the 18th day of June, 1878, Congress passed an act entitled "An act to provide for the distribution of the awards made under the Convention between the United States of America and the Republic of Mexico concluded on the 4th day of July, 1868." By the 1st section of said act, the Secretary of State is required "to receive any and

all moneys which may be paid by the Mexican Republic under and in pursuance of the Conventions between the United States and the Mexican Republic for the adjustment of claims, concluded July 4th, 1868 and April 29th, 1876, and whenever and as often as any instalments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals, respectively, in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns."

By the 5th section of said act, the President of the United States is requested "to investigate any charges of fraud presented by the Mexican Government as to the case of the said Benjamin Weil, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the award in the case of Benjamin Weil should be opened and the case retried, it shall be lawful for him to withhold payment of said award until such case shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct." It appears that the President, through the Hon. William M. Evarts, then Secretary of State, did make the investigation requested, as to the charges of fraud presented by the Mexican Government, and after full argument on both sides, did decide in 1879, "that neither the principles of public law nor considerations of justice or equity, require or permit, as between the United States and Mexico, that the award in this case should be opened and the case retried before a new international tribunal, or under any new convention, or negotiation respecting the same between the United States and Mexico." This decision of the President was communicated to Congress in a special message, dated 15th of April, 1880, and since that time no action has been taken by Congress on the subject. In the letter of the Hon. Wil-

liam M. Evarts, Secretary of State, which was transmitted by the President to Congress in the special message referred to, the suggestion is made that a further inquiry should be had before some domestic tribunal to be established by Congress, to ascertain whether or not there may have been a fraudulent claim made by the said Benjamin Weil. That letter concludes with these words. "unless Congress should now make this disposition of the matter and furnish thereby definite instructions to the department, to reserve further payments upon these awards (the awards in the cases of Benjamin Weil and the La Abra Silver Mining Co.) till the conclusion of such investigation, and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept these awards as no longer open to reconsideration, and proceed in the payment of the same pro rata with all other awards under the Convention."

Congress adjourned without providing the proceedure suggested. Instead of providing any such proceedure for said investigation, or giving any definite instructions, Congress declined to take any action whatever. The Senate Judiciary Committee made an adverse report on Senate bill 1682, directing the Court of Claims to investigate the claims of Benjamin Weil and La Abra Silver Mining Co., and it was indefinitely postponed. Congress having adjourned without taking the action suggested, the President did what he said he would do, and decided that the said award was no longer open to reconsideration. Accordingly, the Secretary of State, as we have seen, paid to Benjamin Weil and his assignees, in 1880, their proper proportion of the four instalments, and again in 1881, their proper proportion of the fifth instalment received from the Government of Mexico. In view of the facts and matters thus briefly recapitulated, the Supreme Court of the District of Columbia decided that the Relator is entitled

to a peremptory writ of mandamus upon the Secretary of State, commanding him to pay seven thousand five hundred and ninety-five dollars and thirty-nine cents, the sum to which the Relator is entitled, out of the money in his custody received as the sixth instalment from Mexico, under the Convention of July 4, 1868.

In reviewing the decision of the Court below, it becomes necessary to examine with some particularity the positions assumed by the Secretary of State in his answer to the alternative writ That answer was demurred to. The demurrer was sustained, and that is the error complained of here. The answer of the Secretary is lengthy and ingeniously drawn, but when carefully analysed, it will be found that it presents only a few salient points, which may be classified as follows:

1st. The respondent is Secretary of State, and withholds the money by order of the President, who is the head of the Executive Department.

2d. The President, believing that the award was obtained by fraud and perjury, has negotiated a treaty with Mexico, providing for a rehearing of the case, which has been submitted to the Senate of the United States and is now under consideration in that body.

3d. Awards like this, made under treaties in favor of the citizens, are subject to the political power of the Government, and if in the exercise of that power private rights are impaired, the assumption of law is that the Government of the United States will voluntarily make all proper reparation, and not by the coercion of the Judiciary Department.

4th. The provisions of the first section of the act of June 18, 1878, are expressly limited and controlled by the provisions of the fifth section, which confers a continuing jurisdiction.

5th. The President believes the award was obtained through fraud of which there is newly discovered evidence unknown to Mr. Evarts and President Hayes when they made their decision, and for that reason a retrial may be had by invoking the treaty-making power.

Let us examine these propositions briefly:

1st. Is the Secretary of State justified in withholding this money because the President has so ordered? We submit that such doctrine is utterly subversive of well-settled principles of law, and destructive of the fundamental theory that this is a Government of limited powers. The sanction of such doctrine by the judiciary now would constitute a new departure, and establish a new era in the history of American jurisprudence. In the leading case of Marbury vs. Madison, 1st Cranch, this Court said, "the Government of the United States has been emphatically termed a Government of laws and not of men." And again: "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience. To aid him in the perfor nance of these duties, he is authorized to appoint certain officers who act by his authority, and in conformity with his orders. In such cases their acts are his acts. * * But, when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others."

In the recent case of "The United States vs. Lee," this Court said: "No man in this country is so high that he is above the law; no officer of the law may set this law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and

are bound to obey it. It is the only supreme power in our system of Government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government." The first section of the act of June 18th, 1878, requires the Secretary of State to receive the money which may be paid by the Mexican Republic under the said Convention, and to distribute it in ratable proportions among the parties in whose favor the awards have been made. This is a plain ministerial act which he is required to perform. He has no discretion in the matter whatever. The law imposes the duty upon him and he is bound to obey. This is not a case in which it may be claimed that the issuance of the writ would interfere with a discretionary power conferred upon a co-ordinate department of the Government. It is readily conceded that if the Secretary had any discretion in the matter whatever, the writ of mandamus could not properly be issued against him. But the law requires him to do a certain act, and hence, there can be no exercise of discretion on his part.

2d. The Secretary states in his answer, that the President has negotiated a treaty with the Republic of Mexico, providing for a rehearing of the Weil claim, which has been submitted to the Senate, and is now under consideration in that body. Is that a sufficient answer to the alternative writ? The treaty is pending, we are told, but who knows that it will ever be ratified? How long is the Relator to wait for his money which the Secretary has been commanded to pay? Two sessions of the Senate have expired since the treaty was submitted. Is he to wait for a third and a fourth and a fifth, and so on, *ad infinitum?* The

President has no power to make a treaty, except with the advice and consent of the Senate and with the concurrence of two-thirds of its members present. As was well said by Mr. Justice Cox, in delivering the opinion of the Court below: "Until those conditions concur, a treaty negotiated is no more the law of the land than a bill introduced into one of the Houses of Congress, but not yet acted on by either. Not being yet law, it is wholly inoperative to affect antecedent laws or the rights acquired under them. It furnishes no more excuse for disobedience to an existing law than would the pendency in Congress of a bill to repeal it. It is manifest, therefore, that the pendency of this treaty is no legal bar to the claimant's assertion of his rights under the act of 1878." Again, we maintain that the treaty, if ratified, would be wholly *invalid*, because it violates the Constitution and is destructive of the fundamental principles of the Government. It grants a new trial in a case decided by a court, and that, whatever be the form in which it is done, is an exercise of judicial power. By the Constitution, the judicial power is vested in the Judiciary Department exclusively, except that the Senate may try impeachments on articles preferred by the House of Representatives. The exercise of any judicial power by the Executive Department or by the Legislative Department or either branch of it, with the single exception above mentioned, or by both those Departments, or by the former in conjunction with one branch of the latter, as in case of the pending treaty, would be void, because it would be an invasion of the powers confided to the Judiciary Department. The Legislative, Executive and Judiciary Departments being entirely independent of each other and all the judicial powers being vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish, it follows necessarily, that while the President, with the advice and consent of the Senate, may make a treaty, he cannot grant a new trial in a case decided by a court, because that is a

judicial and not an executive or legislative function. The President and the Senate combined can no more grant a new trial than the court can make a treaty. The treaty-making power, like all other departments of the Government must act in obedience to the limitations and restrictions imposed by the Constitution. It cannot usurp the functions of the Judiciary Department. When it undertakes to do that it is the duty and the province of the Judiciary as the expounder of the whole Constitution, to interpose its authority. Hence, it will be found that the courts have not hesitated to decide upon the validity of treaties. This Court, in the Cherokee Tobacco case, declared, "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government." 11 Wall., 620. In support of our position that the judgment of a court of competent jurisdiction cannot be set aside by the treaty-making power and a new trial granted, we refer to the following authorities:

Con. of U. S., Art. 3d, Sec. 1.
Cooley on Con., Lim., 114, 115.
Kilbourn vs. Thompson, 13th Otto, 168, 190, 193.
The United States vs. Klein, 13 Wall., 128.
State of Penn. vs. the The Wheeling and Belmont Bridge Company, 18 Howard, 421.
Merrill vs. Shelburn, 1 New Hampshire, 199.
Griffins, exc'r, vs. Cunningham, 20th Grattan, 31.

Again, the pending treaty is retrospective in its operation and destroys a private vested right. Though in form a contract between two governments, a treaty is expressly made a law of the land by the Constitution. Like other laws it may repeal, or be repealed, by an act of Congress, and may be declared by the courts to be invalid if it violates the Constitution. In so far as its provisions do not require legislation to execute them, it is to be regarded in

courts of justice as equivalent to an act of the Legislature. It follows, therefore, that its validity is to be tested and the rights of a citizen acquired under it are ascertained and protected by the same principles which obtain and control in a like case of an act of Congress or any municipal law.

Foster vs. Neilson, 2 Peters, 253, 314.
The Cherokee Tobacco, 11 Wall., 616, 620.
Taylor vs. Morton, 2 Curt. C. Ct., 454.
Doe vs. Braden, 16 How., 635, 657.
Society vs. New Haven, 8th Wheaton, 464.

The judgment of a court of competent jurisdiction is a vested property right in the citizen in whose favor it is rendered under the law by virtue of which it was obtained. The award in question is such a judgment, and has vested such a right in the Relator. That every law which takes away or impairs a vested right acquired under existing laws must be deemed retrospective is too well settled to require argument. There is no provision in the Constitution on the subject of retrospective civil laws, and the power which it gives to make treaties is general. But, "it is a principle of the English Common Law as ancient as the law itself, that a statute, even of its omnipotent Parliament is not to have a retroactive effect, and that no law shall be construed to operate retrospectively so as to impair or take away a vested right." And "in the theory of our Government, there is no such thing as unlimited power in any of its branches," but there are "implied reservations of individual rights" arising out of the essential nature of the Government, which are limitations on the express grants of power in the Constitution, however general those grants may be; and among these "reserved individual rights" must be classed the fundamental right that "private property should be held sacred." This reserved individual right and this limitation are implied from the express prohibition in the Constitution that pri-

vate property shall not be taken for public use, even for the very necessities of the Government without just compensation. The pending treaty, therefore, would, if ratified, be invalid and void without reference to any express Constitutional prohibition, and because of its violation of the above mentioned fundamental principles of our Government, and the consequent illegitimate exercise of the treaty-making power.

Loan Association vs. Topeka, 20 Wall., 655, 663.
Wilkinson vs. Leland, 2 Peters, 627, 657.
Dash vs. Vankleeck, 7 John., (N. Y.,) 477, 502.
Mann vs. Eckford's Ex'r, 15 Wend., (N. Y.,) 519.
Lewis vs. Webb, 3d Greenleaf, (Me.,) 326, 336.
Hill vs. Sunderland, 3 Vermont, 507, 514.
Bates vs. Kimball, 2 Chipman, (Vt.,) 77, 88, 89.

The pending treaty, if ratified, would deprive a citizen of his property "without due process of law," which is expressly prohibited by the Constitution, and for that reason would be unconstitutional and void. This prohibition of the Constitution "is not limited to judicial proceedings, but extends to every proceeding which may interfere with those rights, (life, liberty and property), whether judicial, administrative or executive." Stuart vs. Palmer, 74, N.Y., 183, 190. The pending treaty in so far as it will deprive the Relator of his property is not "due process of law." The phrases "law of the land," and "due process of law," mean the same thing (2 Kent Com., 13), and therefore decisions as to either are equally applicable. "The true interpretation of these phrases (law of the land, and due process of law) is that where rights are acquired by the citizen under existing laws, there is no power in any branch of the Government to take them away; but when they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him, not by an act of the Legislature, but in the due administration of the law itself before the judicial tribunals of the State.

Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence." Per Comstock, J., 13, N. Y., 378, 393. "A law which is partial in its operation is not a law of the land within the meaning of the Constitution." Wally's heirs vs. Kennedy, 2 Yerger, 554. The award in question is property within the meaning of the Constitution. Meades's case reported in 2nd Ct. of Claims, 278, decides that it is as much property as houses or lands, horses or cattle. But waiving argument as to the award itself, the money which has been received by the Secretary of State on account of it, which is now in his hands, and to compel the payment of which to the Relator this proceeding is brought, is property in the fullest and most technical sense, and to deprive the Relator of it is to take his property from him without "due process of law." Westervelt vs. Gregg, 12 New York, 202. This decision is regarded as particularly pertinent because of the great similarity of the facts, and because the Constitution of New York contains an identical clause. It is no answer to say that the money is not actually taken from the Relator, but is only withheld to abide the event of a new trial, and may yet be paid to him. That is a contingent deprivation, and a contingent equally with an absolute deprivation is within the prohibition of the constitutional provision referred to. In Burch vs Newbury, 10 New York, 374, under an identical constitutional provision, and in a like case of a judgment with money collected on it which might be lost to the creditor by an act allowing an appeal to be brought after the time had passed—it was held that "a statute which contingently deprives a person of property, the right to which was perfect under prior laws is within the prohibition of the Constitution." And at p. 397, Jewett, J., says, "if the act *may result* in depriving the defendant of his property, it is, in my opinion, contrary to the Constitution. And this answer, be it observed, is not that there is a treaty in entity, but

only one pending before the Senate for ratification. Until ratified it is a mere inchoate instrument, and has no operative force whatever Its ratification is not probable, if we may judge from the fact that it has been pending during two sessions of the Senate, and yet remains unratified. The bare possibility that this proposed treaty may sometime or other become a law—a law which if made will be unconstitutional and void, is gravely assigned as a reason why the mandate of the Court should not be obeyed, commanding that the money of the Relator received and held in trust for him by the Secretary of State be paid over to the Relator by that trustee. Of what avail would such a defence be if it were the case of a private person refusing to turn over trust funds to his *cestuique trust?* The wrong to the Relator is none the less because done by a Government official, and none the less requires to be redressed. It has been our boast that the Judiciary Department of the Government secures the rights by enforcing the remedies of all, high and low alike, and that it will protect the rights of the humblest citizen against theencroachments of arbitrary power.

3d. The Secretary in his answer announces the proposition that awards like this made under treaties, in favor of the citizen, are subject to the *political* power of the Government, and if in the exercise of that power private rights are impaired, the assumption of law is that the Government of the United States will voluntarily make all proper reparation, and not by the coercion of the Judiciary Department.

More than one hundred years ago Junius wrote of the British constitution, that "the power of King, Lords and Commons is not an arbitrary power." They are, said he, "the trustees and agents only and not the owners of the estate. The fee-simple is in us, the people." But if it be true, as is claimed by the Secretary, that the President of the United States is invested with a sort of undefined gov-

ernmental dispensing power, by which private rights may be disturbed, we have been mistaken in supposing that ours is a Government of well-defined and limited powers. Chief Justice Marshall was laboring under a delusion when he declared that "this is emphatically a Government of laws and not of men." This new doctrine of the Secretary finds no warrant in that clause of the Constitution which makes "treaties creating international commissions the supreme law of the land." Nor has it yet received the sanction of the courts. On the contrary, this Court held in the case of Judson vs. Corcoran, 17 Howard, 612, that the award of one of these international commissions is technically a judgment of a court having all the legal efficacy of a technical judgment, and that it vests a legal title to the money in the person to whom it is awarded.

In Comegys vs. Vasse, 1 Peters, 212, it was held that the money awarded by such judgments becomes, in virtue of the judgment, because vested, private personal property of the awardee, in such sense as that the United States cannot deal with the money awarded, as a mere donation secured through the good offices of the Government; that as such property it passes to the assignees in bankruptcy and to the heirs and representatives of the awardee, and that it can not be taken for public use except upon full compensation. In Gibbs' case, 13th vol. Opinions of Att'y Genl's, Mr. Hoar, an eminent Attorney General, decided that the relation of the United States to the money awarded by an international commission, is in no sense that of owner, but that of a trustee only. As to the force and effect of awards made by international commissions, see letter of Mr. Seward, of 3d of March, 1869, to the Venezuelan Minister, also letter of Mr. Adams to the President, in the Meade case, dated 13th of February, 1821, and letter of Mr. Clay in the same case, dated 12th March, 1821. In view of these authorities and others which might be cited, we insist that this award cannot be disturbed by any vague, undefined *political* power of the Government, but when it was made

by the international commission, being a judgment of a court of competent jurisdiction, it vested in Benjamin Weil and his assignees, a legal title to the money awarded as private personal property, which cannot now be divested and the property cannot now be taken for the use of the Government except upon due process of law and upon full compensation.

4th. The Secretary takes the position that the provisions of the 1st section of the act of June 18, 1878, are expressly limited and controlled by the 5th section, which confers a continuing jurisdiction. In reply, we respectfully submit that the 5th section of the act referred to is unconstitutional, and that Congress had no power to provide for the reconsideration and retrial of the Weil claim. The matter was already *res adjudicata*. It had passed beyond the domain of legislation. By the terms of the Convention itself, the decision of the Commission was made absolutely final and conclusive. The very object of the arbitration was to secure finality and put an end to litigation. The award created a complete obligation, which had its inception from the time when the award was made. It needed no further ratification, and operated as a final and conclusive judgment between the parties. It became the private personal property of Benjamin Weil in every just and legal sense of that term. It vested in him a complete legal title to the money, which could not be divested without his consent by an act of Congress.

R. W. Gibbes vs. New Grenada, 13th vol. of Opinions of Att'y Gen'ls, 19.

Meade vs. The United States, 2d vol. of Court of Claims Reps., 277.

William Judson vs. W. W. Corcoran, 17 Howard

Comegys vs. Vasse, 1 Peters, 212.

Reickart vs. Felps, 6 Wallace, 160.

But if it be conceded, for the sake of the argument, that the 5th section is not obnoxious to the objection made

upon constitutional grounds, we maintain that the power attempted to be conferred by it has been completely exhausted, and that it is now to all intents and purposes a dead letter upon the statute book. It requests the President to investigate any charge of fraud preferred by the Mexican Government as to the case of Benjamin Weil, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the award should be opened and the case retried, it shall be lawful for him to withhold payment of said award until such case shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct. The Court will observe that it limits the discretion of the President in withholding payment to one single condition. In other words, it is made a condition precedent to his withholding payment that he shall be "of opinion," &c., &c.

What was the opinion of the President? He decided that "neither the principles of public law, nor considerations of justice or equity require or permit, as between the United States and Mexico, that the award in this case should be opened and the case retried before a new international tribunal, or under any new Convention or negotiation respecting the same between the United States and Mexico." We insist that by this action all the power conferred by the 5th section has been exhausted, and that it is now entirely *functus officio*. The only operative force it ever had depended upon a condition which has not been fulfilled. The action of President Hayes and Secretary Evarts under the 5th section, is final and complete. There can be no review of it by their successors in office. The present administration is bound by the action of its predecessors. If the President and Secretary of State can review and reverse the action of Mr. Hayes and Mr. Evarts, then they may in turn be reviewed and reversed, and so on, to the end of the chapter.

In the case of "The United States vs. Arredondo and others," 6 Peters, 728, the Court say "it is an universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject-matter."

In "Lyttle vs. The State of Arkansas," 9th Howard, 333, the Court say: "The register and receiver were constituted by the act a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers as sanctioned by the Commissioner and within the law, and the decision cannot be impeached on the ground of fraud and unfairness, it must be considered final."

In the case of "The United States vs. The Bank of the Metropolis," 15th Peters, 401, it is held that, "the right of an incumbent to review his predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation and to cases of rejected claims in which material testimony is afterwards discovered and produced. It is no longer a case between the convictions of one officer's judgment and that of his successor."

In "Kendall vs. The United States," 12 Peters, 524, it was held that "by the act of Congress directing the Solicitor of the Treasury to adjust and settle the accounts of Stokes, the Postmaster General is vested with no discretion or control over the decision of the Solicitor, nor is any appeal or review of that decision provided for. If there was no fraud or misconduct in the arbitrator, of which none is pretended or suggested, it may well be questioned whether Stokes had not acquired such a vested right as to be beyond the power of Congress to deprive him of it."

In view of these well-settled principles, we repeat with confidence that when President Hayes made his decision

under the 5th section, it was not subject to review by his successor in office, and that the matter is now *res adjudicata*.

It is true that in the report of Secretary Evarts transmitted to Congress by the President on the 15th of April, 1880, the suggestion is made that the honor of the United States requires that the Weil case should be further investigated by a domestic tribunal to be provided by Congress; but such an intimation was wholly outside of the provisions of the 5th section, and it was so unanimously determined by the Judiciary Committee of the Senate. That section provided that in the event the President should be of a certain opinion it should be lawful for him to withhold the payment of the money until the case shall be retried and decided in such manner as the Governments of the United States and Mexico may agree or until Congress shall otherwise direct. It contained no authority for the establishment of any domestic tribunal. It did not attempt to legalize any new trial but an international as distinguished from a domestic one. When the President decided that principles of public law and considerations of justice and equity forbade an international new trial, he decided the only question that the 5th section submitted to him. Again, in the same report which contains Mr. Evarts's suggestion as to the domestic tribunal he makes the explicit declaration that "unless Congress should now make this disposition of the matter and furnish thereby definite instructions to the Department to reserve further payments till the conclusion of such investigation and to take such further order with the same thereafter as Congress might direct, it would appear to be the duty of the Executive to accept the award as no longer open to reconsideration and proceed to the payment of the same pro rata with all other awards under the Convention." What was the action of Congress in response to the message of the President communicated on the 15th of April, 1880? Did it make the disposition of the matter suggested by the report of the

Secretary? Did it provide a domestic tribunal for further investigation? Did it furnish definite instructions to withhold further payment until the case could be reopened and retried? On the contrary, Congress declined to respond favorably to the suggestion made or to take any action on the subject. A bill was introduced into the Senate directing the Court of Claims to make the investigation, but on the 10th day of June, 1880, the Judiciary Committee of that body reported it back adversely and recommended its indefinite postponement. Under these circumstances it appears that it was the plain duty of the Executive according to its own understanding and appreciation of the matter to accept the award as no longer open to reconsideration and proceed to make payment of the same. Accordingly, we find that after the adjournment of Congress in 1880, Mr. Secretary Evarts paid on the award in favor of Benjamin Weil and his assignees their pro rata proportion of the first four instalments received by the United States from Mexico, and subsequently in 1881 their pro rata proportion of the fifth instalment was paid by Mr. Secretary Blaine.

5th. While the answer does not distinctly make a specific charge of fraud, it plainly intimates that the award was obtained through fraudulent means, and states that upon that subject there is newly discovered evidence which was unknown to Mr. Evarts and President Hayes when they made their decision. In reply, it is sufficient to say that it is too late to agitate the question of fraud in this case. Mexico has had her day in court. According to the report of Secretary Evarts "before this Commission the Government of Mexico had full opportunity and ample time to present its defense both in evidence and argument against any claim that was submitted. In the Weil case it is true that the Mexican Government submitted no testimony, and that the case was decided upon the evidence offered by the claimants; but the Mexican Commissioner explicitly declined the offer of further time to produce such testimony,

although he professed that his Government had such in possession."

The contention of Mexico before the Commission was that the Weil claim was a fraudulent one. That was the matter distinctly put in issue, and upon that the Commission decided. Would any court in the land entertain a motion to grant a new trial upon such grounds? In courts of law motions of this kind are always received with great caution, because there are few cases tried in which something new may not be hunted up, and because it tends to the introduction of perjury to admit new evidence after the party who has lost the verdict has had an opportunity of discovering the points both of his adversary's strength and his own weakness. In Sample vs. Barnes, 14 Howard, 70, this court said: "A court of equity can never be invoked to remedy the consequence of *laches* or *neglect*, or the want of *reasonable diligence*. Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted to supply the omission to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice." In Hendrickson vs. Hinckley, 17 Howard, 445, the court said: "To entitle the party to relief he must show that he had a good defense which he was prevented from availing himself of by fraud or accident *unmixed* with negligence of himself or agent." And in the recent case of The United States vs. Throckmorton, 8th Otto, 61, this Court held unanimously that neither false testimony, forged testimony, nor any other frauds which were not *extrinsic or collateral to the matter tried*, will vitiate the judgment." The Court will observe that the Secretary does not distinctly make a specific charge of fraud, nor is it attempted to be shown that the additional evidence referred to was material, or that it could not have been produced by the use of due diligence before the decision was made by President Hayes and Mr. Evarts. It would be needless to multiply authorities to prove that the vague

and indefinite allegations of the answer on this subject do not require serious refutation. Of course, it would not be proper to refer to anything not appearing in the record, but under all the circumstances, we feel warranted in saying that this hue and cry of fraud now raised by Mexico is only a lame attempt to supply the omissions made by her own agents at the time of the trial, and to furnish an excuse for that "Punic faith" which has characterized her conduct from the beginning to the end of this transaction. The only ground upon which this award could possibly be set aside, would be fraud on the part of the commissioners or the umpire, and that has not been suggested even by Mexico. It has not been pretended in any quarter that the commissioners or the umpire have been influenced by any improper motives, or that they are affected with the least taint of fraud. No breath of suspicion even has been whispered against them. As to Sir Edward Thornton, who decided the case as umpire, Mr. Evarts has well said in his report, that he "was pre-eminently fitted for his laborious and responsible duties by his long diplomatic experience, his recognized ability, his high character, and his special knowledge of the two countries, whose citizens and Governments were interested in the arbitration."

We submit that the Solicitor-General is mistaken in the statement which he makes in his Brief that a part of the duty required of the President by the act of 1878 was to render an opinion whether the *honor of the United States* required that the Weil award should be *retried* in such manner *as Congress might direct*. An examination of the 5th section will show that the duty imposed upon him was to investigate the charges of fraud; and if he should be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity required that the award should be opened and the case *retried*, then it was lawful for him to withhold payment until the case could be *retried and decided in such manner as the Governments of the United States and Mexico may agree*,

or until Congress shall otherwise direct. *He was not authorized to withhold payment unless he should be of opinion that the honor of the United States * * required a new international trial.* Having decided that *such new trial* was not even permissible, there was no alternative left to him but to order the payment of the money, which was accordingly done. As to the suggestion of the idea of *comity* which has been made by the learned counsel, we submit that the province of this Court is to expound the law as it exists, and to decide, upon a review of the whole case, whether there is error in the judgment of the Court below. If the claim of Benjamin Weil and his assignees against the Republic of Mexico has not been fully and fairly adjudicated, it would be difficult to conceive of the final determination and settlement of any claim whatever. In the first place, we have an award made under the Convention of July 4th, 1868, which, by the very terms of the Convention itself, was to be absolutely final and conclusive. In the second place, this award was solemnly ratified and confirmed by a subsequent treaty, concluded on the 29th of April, 1876. In the third place, this award was again recognized by the two Governments in the settlement of the expense account on the 14th of December, 1876. In the fourth place, it has been again recognized and enforced by the payment of a pro-rata share of five different instalments of the money received from Mexico. In the fifth place, the Executive Department, after full investigation, made in obedience to the request of Congress, has decided that neither the principles of public law nor considerations of justice or equity require or permit, as between the United States and Mexico, that the award should be opened and the case retried. In the sixth place, the Congress of the United States has positively declined to make any disposition or to furnish any instructions touching the award other than those contained in the act of June, 1878, which directs the Secretary of State to pay the money to the parties entitled to receive it. Does *comity* require the faith of solemn treaty stipula-

lations to be disregarded? Does *comity* require further indulgence to be extended to Mexico? Does *comity* require that to be done which the principles of public law and considerations of justice and equity forbid? Does *comity* require the courts of justice to be closed against a citizen who relies upon the faith of treaties and invokes the interposition of law to protect him in the enjoyment of his rights of property? Does *comity* require this Court to await the pleasure of the Senate in the consideration of a treaty which has been pending during two sessions, which may never be ratified, and which, if ratified, would be absolutely null and void? We can find no precedent that sanctions any such sublimated notion of *comity* as that. The law of Congress, which the Court sits here to administer, makes it the plain duty of the Secretary of State to pay the money now in his custody as trustee. It is a ministerial act which he is required to perform, and he has no discretion in the premises. The Relator has a clear legal right to the relief sought, and there is no other specific legal remedy to which he may resort. We submit that the Supreme Court of the District of Columbia committed no error in sustaining the demurrer and in commanding a peremptory writ of mandamus to be issued.

JOHN GOODE,

Att'y for JOHN J. KEY, *Relator, &c.*